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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY ISAAC BLACKFORD, A. M.

ONE OF THE JUDGES OF THE COURT.

SECOND EDITION.

ANNOTATED BY WARWICK H. RIPLEY, INDIANAPOLIS.

The foot-notes refer not only to cases wherein similar decisions are rendered, but also to cases wherein the same principle is discussed or cited.

VOL. II.

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JUDGES
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

JAMES SCOTT, Esquire.

JESSE L. HOLMAN, Esquire.

ISAAC BLACKFORD, Esquire.*

STEPHEN C. STEVENS, Esquire.†

JOHN T. M'KINNEY, Esquire.†

* Re-appointed on the 28th of January, 1831.

† Judges Stevens and M'Kinney were appointed on the 28th of January, 1831, in the place of Judges Scott and Holman, whose term of office had expired.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1826, IN THE ELEVENTH YEAR
OF THE STATE.

HARRISON and OTHERS *v.* DOE, on the Demise of RAPP.

JUDICIAL SALE—APPRAISMENT.—The real estate of B. was, in 1823, sold on execution under a judgment recovered against him by A. in 1822, which judgment had not been replevied. A. the execution-plaintiff, was the purchaser for 565 dollars. The property sold had been appraised, under the statute of 1820, at 4,640 dollars. In ejectment by A. for the premises, it was held that no bid for the land could be made, under the statute of 1820, for less than 2,320 dollars, the one-half of the appraised value; and that the sheriff's sale therefore for 565 dollars was void, and his deed conveyed no title to the purchaser (*a*).

SAME—NOTICE—EXECUTION-PLAINTIFF.—If the purchaser of real estate at sheriff's sale be the execution-plaintiff, he is considered a purchaser with full notice, and accountable for all irregularities (*b*).

ERROR to the Knox Circuit Court.—Ejectment by Doe on the demise of Rapp against Harrison, Badollet, and Buntin, for a house and lot in Vincennes. Plea, not guilty. Verdict and judgment for the plaintiff below.

(*a*) See 8 Blkf. 575; 1 Ind. 24; 19 *Id.* 15; 27 *Id.* 450; 12 *Id.* 192.

(*b*) See 8 Blkf. 575; 59 Ind. 466.

Harrison and Others v. Doe, on the Demise of Rapp.

SCOTT, J.—On two judgments obtained by Frederick Rapp against the bank of Vincennes in June, 1822, executions of *fi. fa.* were issued and levied on the premises in controversy. After the return of those executions, writs of *venditioni exponas* were issued, and on the 20th of September, 1823, the property was sold, and Rapp became the purchaser for the sum of 565 dollars, and received the sheriff's deed. By the statute in force at the time of this sale, it was provided that where the judgment had not been replevied, no real property [*2] *should be sold, on execution, for less than one-half of its real value, Stat. 1820, p. 4 (1). The judgment in this case was not replevied, the property was valued according to the provisions of the statute, and the real value, thus ascertained, was 4,640 dollars. Nothing less than 2,320 dollars was a legal bid, and without a legal bid there could be no legal sale. Any sum bid for the property less than 2,320 dollars was as no bid at all; and in that case the sheriff ought to have returned, that the property remained unsold for want of buyers.

How far a stranger to the title of the execution-defendant, or a person claiming under a title adverse to the title of the bank, could take advantage of this circumstance in his defence in an action of ejectment; or how this irregularity would affect a stranger, purchasing at the execution-sale, for a valuable consideration, without notice; are questions not within the case. Here the defendants claimed title as assignees, and privies in estate to the bank; and the property was purchased by the execution-plaintiff, who must be considered a purchaser with full notice, and accountable for all irregularities. *Simons v. Catlin*, 2 Caines, 61; *Goodyer v. Junce*, Yelv. 179; *Parsons v. Loyd*, 3 Wils. 341; *Read v. Markle*, 3 Johns. R. 525; *Lawrence v. Speed*, 2 Bibb, 401; *Hayden v. Dunlap*, 3 Bibb, 216.

The sale in this case was erroneous, and the sheriff's

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deed, made in pursuance of that sale, conveyed no title to the purchaser.

On this ground, and without examining further into the merits of the case, the judgment is erroneous and must be reversed.

Per Curiam.—The judgment is reversed with costs.

Judah, for the plaintiffs.

Tabbs, for the defendant.

(1) This statute is repealed. The sheriff now first offers for sale the rents and profits of the premises for seven years; and if they will not sell for a sufficient sum to satisfy the execution, he then sells the fee-simple to the highest bidder. R. C. 1831, p. 235. For the statute law of the different states on this subject, vide 4 Kent's Comm. 2d ed. 428-438. Vide, also, as to the lien of judgments on real estate, *Ridge v. Prather*, Vol. 1. of these Rep. 401, 404, note (2); R. C. 1831, pp. 274, 275.

[*3] *DAVIS, Assignee, v. CLEMENTS.

NOTE—FAILURE OF CONSIDERATION—BREACH OF WARRANTY.—Debt by the assignee of a sealed note for the payment of money against the maker. The note was dated on the 10th of June, 1817, and payable on or before the 1st of December, 1818. Plea, that the note was given to the payee for the purchase money of a certain tract of land which he represented to be his, and for which he was to make a title to the defendant when the note should be paid; that the payee never had a title to any part of the land; and that, at the time of the plea, he was insolvent and had absconded from the state. *Held*, that the plea was, under the statute, a good bar to the action (a).

SAME—RIGHT OF ASSIGNEE.—The statute secures to the obligor the same equitable defence in an action by the assignee, that he would have been entitled to had the action been by the obligee (b).

ERROR to the Martin Circuit Court.—Debt on a writing obligatory for 146 dollars and 66 cents, executed by Clements to Harris, and assigned by the latter to Oliver, and by Oliver to Davis. The obligation is dated on the 10th of June, 1817, and is payable on or before the 1st of

(a) See 8 Blkf. 368; 6 *Id.* 59; 16 *Ind.* 132; 35 *Id.* 527. (b) Post 364.

Davis, Assignee, v. Clements.

December, 1818. Plea, *actio non*, because, &c., on the 10th of June, 1817, Harris represented to the defendant that he owned three lots of land in Franklin county, and offered to sell them to him. The defendant, accordingly, purchased the lots of Harris for the sum of 146 dollars and 66 cents; and then, on the 10th of June, 1817, executed the obligation in question for the same. Harris, at the same time, executed his bond to the defendant, conditioned for the making of a good title in fee-simple for the lots to the defendant, on his payment of the purchase-money. Harris never had any title to the lots—they being on the 10th of June, 1817, and still being the property of Bates. Harris has never been able to make the defendant a title for the lots. He is insolvent, and has absconded from the state. Hence the defendant was defrauded in the purchase, and has received no value for the obligation. The plea concludes with a verification.

General demurrer to the plea, and judgment for the defendant.

HOLMAN, J.—Agreeably to the case of *Leonard v. Bates*, May term, 1822, the decision of the Circuit Court in this case is correct (1). The demurrer admits the facts stated in the plea, that the note was given for the purchase-money for *the land; and that Harris never had a title to the land, and could make no conveyance to the defendant. These facts, alone, show that the consideration of the note has wholly failed. Although the title was not to be made until payment of the money, it was to be made as soon as the money was paid; and the defendant was not bound to part with his money, until he saw not only a disposition but an ability in the vendor to make the title. The cases cited in *Leonard v. Bates* support this position; and one of the principal reasons of this doctrine is given by Lord Kenyon in *Goodisson v. Nunn*, 4 T. R. 761,—“that it would be absurd to compel one party to a compliance on his part without a compli-

Davis, Assignee, v. Clements.

ance on the other part, and put him to the necessity of having recourse to the other for non-compliance, when that other might be insolvent." But this case grows stronger by the consideration, that what is supposed possible in other cases, is reduced to a certainty in this; for it is a fact, admitted by the demurrer, that Harris, the vendor, is actually insolvent, and has absconded from the state. Under such a state of facts, the principles of common honesty would entitle the defendant to the most liberal construction of the foregoing doctrine in his favor.

The defendant does not, as the plaintiff's counsel supposes, rest this case as to the impeachment of the note on the ground of fraud, as he must have done at common law; but he rests his defence, principally, on a total failure of consideration under our act of assembly; and as there has been a total failure of consideration, he is authorized by the act of assembly to plead it (2).

If this note had remained in the hands of Harris, and the action had been brought by him, this plea would have been an unquestionable bar to the action; and the act of assembly secures to the obligor the same equitable defence against the assignee that he would have had against the obligee; we therefore have no doubt but that the plea was properly sustained (3).

Per Curiam.—The judgment is affirmed with costs.

Tabbs, for the plaintiff.

Dewey and *Kinney*, for the defendant.

(1) Vol. I. of these Rep. 172, and note (2), p. 176; *Muchmore v. Bates*, Ibid. 248. Where, as in the case in the text, the payment of the purchase-money and the execution of the deed are to be concurrent acts, a suit can not be sustained for the money until the vendor has executed or offered to execute the title. Ibid. Nor can *the vendee recover for a breach of the contract, in such a case, unless he has paid the whole of the purchase-money; *Huntington v. Colman*, Ibid. 348; *Meriwether v. Carr*, Ibid. 413; and unless he has also made a demand of the deed. *Sheets v. Andrews*, Nov. term, 1829, post.

(2) *Leonard v. Bates*, cited in the text, and note (1); R. C. 1831, p. 405.

(3) The statute, after making notes and bonds assignable, enacts:—"that

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such assignee or assignees shall allow all just set-offs, discounts, and defence, not only against himself, but against the assignor, before notice of such assignment shall have been given to the defendant." R. C. 1824, p. 330; R. C. 1831, p. 94.

THE STATE v. M'CORY.

ASSAULT AND BATTERY—FORMER ACQUITTAL.—Indictment for an assault and battery. Plea, that before the commencement of the prosecution, the defendant had been arrested on the warrant of a justice of the peace of the county for the charge set forth in the indictment; and that, after a full examination of the case, the justice had acquitted him of the offence. *Held*, on demurrer, that the plea was a good bar to the prosecution (a).

SAME—JUSTICE OF PEACE—JURISDICTION—SURETY OF PEACE.—The statute, authorizing justices of the peace to punish trivial breaches of the peace by fine not exceeding three dollars, is not unconstitutional; and it is discretionary with the justice whether to try a charge of a breach of the peace himself, or to recognize the defendant to answer the same at the next term of the Circuit Court.

ERROR to the Clark Circuit Court.

HOLMAN, J.—M'Cory was indicted in the Clark Circuit Court for an assault and battery. Plea, that before the finding of the bill by the grand jury, and before the commencement of the prosecution, the defendant was arrested by virtue of a warrant from a justice of the peace of said county, on a charge of assault and battery, being a charge of a trivial breach of the peace, and the same charge set forth in the indictment; and being so arrested, he was taken before John Peyton, Esquire, a justice of the peace of said county, and put upon his trial for said charge; and after a full examination of the case, he was by the said justice adjudged not guilty of the offence, and finally acquitted. To which plea the attorney for the state demurred; the demurrer was overruled; and the defendant discharged.

(a) See post 8, 251; 6 Ind. 9.

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The plaintiff contends that the justice had no jurisdiction of the case. The question of jurisdiction depends on the [*6] *construction of the second section of the act regulating the jurisdiction and duties of justices of the peace, R. C. 1824, p. 236; taken in connection with the fifth section of the first article of the constitution. This section of the constitution declares, that "in all criminal cases, except in petit misdemeanors, which shall be punished by fine only not exceeding three dollars, in such manner as the legislature shall prescribe by law, the right of trial by jury shall remain inviolate." By the act of assembly, "it shall be the duty of the justice of the peace to inquire into, and in a summary way to punish, by fine not exceeding three dollars, all trivial breaches of the peace; and judgment give, and execution award; and when, upon examination, it shall appear that three dollars would not be an adequate punishment, it shall be his duty to recognize such offender and the witnesses to the next Circuit Court." The only difficulty on this subject arises from the vagueness of the terms, "*petit misdemeanors* and *trivial breaches of the peace*." The legislature has considered these expressions as synonymous, and we see no impropriety in it; for a *trivial breach of the peace* is but a *a petit misdemeanor*; especially where the breach of the peace merits no higher punishment than three dollars. By this section of the constitution, those minor offences which, in the opinion of the legislature, merit no higher punishment than three dollars, are left entirely within legislative control; and the legislature has determined that trivial breaches of the peace are of this class; and has therefore placed them within the jurisdiction of a justice of the peace.

It should also be recollected, that this clause in the constitution is expressly intended to guard individuals from oppression, by securing to them a jury trial in all cases where they were to be punished by a fine exceeding three dollars. It is not intended to guaranty to the

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community, that every offence should receive an adequate punishment. Under this provision, an individual might object, if the legislature gave a justice of the peace power to fine him more than three dollars; but the state could not complain if the legislature thus placed, under the jurisdiction of a justice, offences which should be punished by a higher fine than three dollars. We consider that the legislature had full power to determine, that *trivial breaches of the peace* were but *petit misdemeanors*; *and to place them, as is done by this act of assembly, within the cognizance of a justice of the peace. Nor is there anything in this clause of the constitution, that prevents the legislature from giving the justice of the peace a discretionary jurisdiction in cases where the fine was not fixed, but was to be proportioned to the circumstances of the case, as is done by this act; limiting the power of fining to three dollars. The constitution does not require that the legislature should fix the amount of the fine: that power may be constitutionally delegated to the justice of the peace; for such a discretionary jurisdiction can not oppress the offender, inasmuch as if the justice of the peace inflicts the punishment, it can not exceed three dollars; and if he determines that three dollars is not an adequate punishment, and recognizes the offender to the Circuit Court, he would then be in the same situation in which he would have been if the justice of the peace had had no power to fine in any case: and in neither case can the state complain that the constitution is violated.

The twelfth sec. of the first art. of the constitution does not reach this case. That section declares, that "no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment." But it is evident from the fifth section, that the framers of the constitution did not consider a *petit misdemeanor* to be a criminal charge. It should be further considered, that this section also is intended to guard individuals against

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oppression; and the character of the act under consideration is the very reverse of oppression. We question whether a single individual has ever been heard to complain, that his constitutional rights have been infringed by placing the determination of an offence, of which he has been charged, within the jurisdiction of a justice of the peace, instead of giving it to the Circuit Court to be tried by presentment or indictment.

This case must then rest on the construction of the act of assembly. And here it is evident, that the jurisdiction of the justice of the peace is not confined to cases where the fine is fixed, and is never to exceed three dollars. His jurisdiction, unquestionably, embraces a class of cases where three dollars may be an inadequate punishment. Of this character are assaults, and assaults and batteries. And we have no doubt but that the legislature

intended to place those offences within his discretionary jurisdiction; authorizing him to hear and determine them, if they were of a trivial nature; but if he was of opinion, that a fine of three dollars was an inadequate punishment, he was to transmit them to the Circuit Court. There are many assaults, and assaults and batteries, which are but trivial breaches of the peace—but petit misdemeanors, that are sufficiently punished by a fine of three dollars; these are, unquestionably, determinable by the justice of the peace. There are others of an aggravated nature, where such a fine would be wholly inadequate; and where the offender should be recognized to the Circuit Court. But if the justice exercises jurisdiction in those cases, and inflicts a fine not exceeding three dollars, we know not how his judgment can be called in question in the Circuit Court. Where the justice acquits, as in this case, it would seem that the question was at an end (1).

The motion to withdraw the demurrer and reply to the plea, and the refusal of the Court to grant that liberty, are no part of the record.

Clark v. Ellis.

Per Curiam.—The judgment is affirmed.

Kingsbury, for the state.

Howk, for the defendant.

(1) Vide the next case—*Clark v. Ellis*—and note (1).

CLARK v. ELLIS.

JUSTICE OF THE PEACE—JURISDICTION—MISDEMEANORS.—In a prosecution before a justice of the peace for an assault and battery under the statute of 1818, the defendant was found guilty by the jury and fined three dollars. An action of slander was afterwards brought for words charging the plaintiff with having sworn false on that trial; and the words were objected to as not being actionable, on the ground that the justice had no jurisdiction. *Held*, that though the statute were deemed unconstitutional so far as it gave the justice authority to inflict a fine exceeding three dollars; yet when, as in this case, the fine inflicted did not exceed that sum, the objection was untenable (a).

CONSTITUTIONAL LAW—PRO TANTO VOID.—A statute may be unconstitutional as to one part of it, and valid as to the residue (b).

ERROR to the Monroe Circuit Court.

HOLMAN, J.—A trial was had in May, 1822, in a prosecution for an assault and battery, before a justice of the peace, under the act regulating the jurisdiction and duties of justices of the peace, approved January the [* 9] 28th, 1818. On that * trial the plaintiff was sworn as a witness and gave evidence; and the defendant, it is said, charged him with swearing false and committing perjury in his evidence so given. For this charge this action is brought.

There were special demurrers to the first and third counts in the declaration, which were sustained by the Circuit Court; and instructions were requested, which were in substance, “that if the jury found that the defamatory words were spoken with reference to a swearing

(a) See 4 Ind. 264, 578.

(b) See 11 Ind. 482; 59 Id. 173, 179, 205; 58 Id. 88.

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on said trial, they should find for the plaintiff;" which instructions the Court refused to give. A verdict was found for the defendant, and judgment was accordingly given.

There are a variety of minor questions raised in the case—as to the specifications of the charge in the declaration—the technical construction of the testimony—and the explaining of the docket of the justice of the peace by parol evidence—all of which we deem unimportant. The cause of action is sufficiently described; the testimony comports in substance with the character of the action; and the testimony relative to the docket of the justice of the peace was not improper.

The whole case may be considered as resting on the constitutionality of the act of assembly, under which the justice of the peace acted.

This act of assembly authorizes a justice of the peace to impanel a jury, and to try cases of riots, routs, affrays, breaches of the peace, &c.; and to fine an offender, agreeably to the verdict of a jury, not exceeding 20 dollars (1). But it appears from the record in this case, that the trial which gave rise to this controversy, resulted in a fine against the offender to the amount of three dollars only. Agreeably to the decision in the case of *The State v. M' Cory*, at this term, the legislature may authorize a justice of the peace to exercise jurisdiction over cases of assault and battery, and to fine the offender to the amount of three dollars: And what the legislature could authorize him to do without a jury, they could certainly authorize him to do with a jury, as in this case. So that, without entering into the disputed question about the constitutionality of that part of the justice's jurisdiction, which has been taken away by the legislature, there can be no question, but that so far as the justice of the peace proceeded in the trial referred to in this action, he

[* 10] was within *the jurisdiction which the legislature had constitutional authority to give. We have

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heretofore decided that a part of an act of assembly being unconstitutional, does not affect a constitutional part of the same act relative to the same subject. That part which is unconstitutional, is considered as if stricken out of the act; and if enough remains to be intelligibly acted upon, it is considered as the law of the land. If this were done in relation to this act of assembly, the justice of the peace would still retain a jurisdiction in cases of assault and battery, and might give a definite sentence where the case merited a fine no higher than three dollars. We, therefore, consider that the trial under consideration was a judicial proceeding, in which a witness might commit perjury; and that the words contained in each of the counts in the declaration are actionable.

The special demurrer, and the instructions required, turn substantially on the same points; the demurrer should, therefore, have been overruled, and the substance of the instructions have been given to the jury.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Naylor, for the plaintiff.

Wick, for the defendant.

(1) The provision in the act of 1818, referred to in the text, was repealed in 1823. Stat. 1823, p. 51. The provision, substituted by the act of 1823 for the one repealed, is adopted in the R. C. 1824, p. 236, sec. 2. The provision in R. C. 1824, is copied and commented on in *The State v. M^cCory*, the case next preceding the one to which this note is annexed. The act now in force is as follows: "In prosecutions before justices, for an assault and battery, affray, or other breach of the peace, the defendant shall be tried by the justice alone, demand a jury, or be recognized to the Circuit Court, at his election. If the defendant be found guilty before the justice, the fine shall not be less than one dollar nor more than 20 dollars. If, on hearing the case submitted to him, the justice shall be of opinion that it is of a nature so aggravated that adequate punishment can not be inflicted under this act, he shall recognize the defendant to the Circuit Court." R. C. 1831, p. 294.

Hays v. M'Kee.

[*11]

*HAYS v. M'KEE.

APPEARANCE—JURISDICTION—WAIVER.—The defendant, by pleading to the action, waives all objection on account of the want of process (a).

RECORD—WRIT AND THE RETURN.—Neither the *capias ad respondendum*, nor the sheriff's return on it, can be noticed by this Court, unless it be made a part of the record in some way known to the law. (b)

PLEADING—SIMILITER—CURED BY VERDICT.—The addition of the *similiter* is only a matter of form, and the want of it is aided by a verdict

ERROR to the Franklin Circuit Court.—Trespass by M'Kee against Hays and several others, for breaking into his close and taking away his goods. Plea of justification. Replication in denial, concluding to the country. No *similiter*. Verdict of guilty against Hays—damages 149 dollars and 20 cents; and of not guilty as to the others. Judgment against Hays agreeably to the verdict.

SCOTT, J.—The plaintiff in error alleges that, prior to the trial, he was not served with process, nor had he appeared to the action. It is stated in the record, that at the October term in the year 1821, the parties came by their attorneys, and the defendants were ruled to plead; and that on the following day several defendants, of whom the plaintiff in error was one, filed their pleas pursuant to the rule of Court. By this statement it would seem that he was present in Court, either in his proper person or by his attorney, and pleaded to the action: by which he waived any advantage which he might have taken of the want of process (1).

It seems to have been taken for granted, that this Court would notice the sheriff's return to the writ, and see that it was not served on Hays; but as the writ and return are not made part of the record in any way known

(a) See 59 Ind. 205; 43 *Id.* 357; 58 *Id.* 94; 37 *Id.* 300; 18 *Id.* 128; 46 *Id.* 315; 27 *Id.* 323; 25 *Id.* 376.

(b) See 24 Ind. 468; 26 *Id.* 287; 27 *Id.* 253; 36 *Id.* 490; 51 *Id.* 122; 9 *Id.* 479.

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to the law, we can not regard them as evidence of that fact (2).

It is further assigned as error that there **was no issue**, there being no similiter added to the replication. It was formerly held that the want of a similiter was a substantial defect and could not be aided by a verdict; but that doctrine has been overruled. The addition of the similiter is now considered matter of form, and the want of it is aided after verdict. The substance of the [*12] issue is the affirmative *and the negative, contained in the pleadings: the similiter is merely an expression of the willingness of the party to submit his case to a jury. Vide 1 Chitt. 571; 2 Saund. 319, n. 6; *Harvey v. Peake*, 3 Burr. 1793 (3).

Per Curiam.—The judgment is affirmed, with 1 *per cent.* damages and costs.

Lane, for the plaintiff.

(1) Vide *Lewis v. Breckenridge*, Vol. 1 of these Rep. 112.

(2) Vide *Shields v. Cunningham*, Vol. 1 of these Rep. 86. In cases of judgments by default for want of appearance, the writ, with the indorsement, is a necessary part of the record. *Nadenbush v. Lane*, 4 Rand. 413.

(3) The tendering of an issue to the country by one party, viz. the prayer to have the cause tried by a jury; and the acceptance of the issue, that is, the consent of the opposite party to have the cause so tried; was a mode of proceeding adopted by the parties in England at an early period, in order to have certain causes tried by an *inquisition of twelve men*, which, without this *mutual consent*, must have been at that time decided by *wager of battel*. Steph. on Plead. Appendix, note, 34; 1 Reeves' Eng. Law, 334. The law has been long since changed; and the right to a trial of questions of fact by a jury no longer depends upon the consent of the parties. If an issue to the country be properly tendered by either of the parties, the other is *compelled* to accept of it. The party tendering the issue may even add the similiter himself, if his opponent should fail to do it. Hence it appears, that the adding of the similiter—the mere entry of the party's consent (which he can not refuse to give) to a submission of the cause to a jury—is now only a matter of form; and that its omission is aided by verdict. It must be admitted, however, that there is some confusion in the books on this subject. Besides the authorities cited in the text, vide Steph. on Plead. 254, 255; Gould's Plead. 313-316; *Jared v. Goodtitle*, Vol. 1 of these Rep. 29, and the cases cited in note (2); 2 Arch. Pr. 272, 273; 2 Tidd's Pr. 8th Lond. ed. 956.

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Having had occasion in this note to mention the trial by *wager of battel*, the reporter will, perhaps, be excused for adding a short notice of a proceeding of this kind which recently occurred in England:—

“In the year 1817 Mary Ashford, a young woman residing in Warwickshire, was murdered under circumstances exciting the strongest suspicion against Abraham Thornton, who had been her companion the previous evening. He was acquitted on his trial upon evidence of an alibi, which apparently covered the short period in which the crime was perpetrated; but the brother of the deceased was advised to bring his writ of appeal, and the proceedings thereon in the Court of K. B. excited the greatest interest in the public mind. The accused, when brought into Court, pleaded as follows:—‘Not guilty, and I am ready to defend the same by my body.’ And thereupon taking off his glove, he threw it upon the floor of the Court. The appellant, after taking time, counterpleaded, setting forth all the facts tending to prove the guilt of the appellee, and praying that he might not be allowed his *wager of battel*; to which the latter, in reply, stated the evidence in his favor, which led to his acquittal. Upon these pleadings, after an elaborate argument by counsel, the Court held that there was not sufficient on the face of the proceedings to justify them in refusing the *battel*; but whether the Court should allow the appellee his *wager of battel*, or to go without day, they did not then determine; suggesting to the ap-
[*13] pellant *the propriety of considering whether he would wish any further judgment to be given. A few days after, the appellant by his counsel stated, that he prayed no further judgment of the Court, whereupon the Court ordered the judgment on the appeal to be stayed, and the appellee to be discharged. See the case at length, 1 Bar. & Ald. 405.

“In the next session of parliament an act was passed to abolish appeals of murder, treason, felony, or other offences, and *wager of battel*, or joining issue and trial by *battel* in writs of right. 59 Geo. 3, c. 46.” 3 Chitt. Bl. 337, note (6).

The American minister, Mr. Rush, was present at the argument of this extraordinary case. The following are his remarks:—

“April 16, [1818,] went to the Court of King’s Bench to hear the argument in the case of *wager of battle*. The parties were present.

“By the ancient law of England, when a person was murdered, the nearest relation of the deceased might bring what was called an appeal of death, against the party accused of the murder. Under this proceeding the accuser and accused fought. The weapons were clubs. The battle began at sunrise, and was in presence of the judges; by whom also all formalities were arranged. Part of the oath was, that neither combatant would resort to witchcraft. If the accused was slain, it was taken as a proof of his guilt; if the accuser, of his innocence. If the former held out until star-light, that also attested his innocence. If either yielded whilst able to fight, it worked his condemnation and disgrace. Those who wish a full description of these curious proceedings, may seek it in Sully, or continental writers of an earlier day, as Froisart; the custom having been imported into England

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by the Normans. The foregoing summary will give a general idea of it.

"It was a mode of trial for dark ages. Ashford the appellor, had accused Thornton the appellee, of the murder of one of his relations, and the latter desired to fight. In the highest tribunal of the most enlightened country in Europe, I was listening to a discussion whether or not this mode of trial was in force in the nineteenth century! It was difficult to persuade myself of the reality of the scene. Mr. Chitty, a lawyer of eminence, argued against the right of battle. Mr. Tindall had argued on the other side, on a former day. Fleta, Bracton, the Year-Books, and other repositories of ancient law were ransacked. Abundant ability was displayed on both sides. The greatest order prevailed; even gravity. The judges were in their robes. About seventy lawyers sat in front of them; all in gowns and wigs, listening, apparently, with profound attention. Finally, the judges decided that trial by battle *was* in force; for it had never, it seems, been repealed.

"In the end, no battle was fought. A technical flaw interposed to prevent it, and parliament passed a repealing statute. But the case marks an incident in English jurisprudence, having come near to converting the Court of King's Bench into a theatre for prize fighting."—*Rush's Mem.* 202.

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*BARKER v. M'CLURE.

PRINCIPAL AND SURETY—JUDGMENT STAY—RELEASE OF SURETY.—The single fact, that the creditor has taken a judgment by confession from the principal debtor with a stay of execution for six months, can not be pleaded by the surety in bar of an action against him by the creditor. The plea in such case, to be valid, must also show that the creditor could, by the ordinary proceedings at law, have collected the money sooner from the principal debtor, than by the course which he had pursued; and that the time was given to the principal without the surety's consent.

NUL TIEL RECORD—QUESTION OF LAW.—The issue on nul tiel record is for the Court, not for the jury, to decide (a).

JUDGMENT—PRACTICE—FINDING.—Issues on three pleas in bar to the whole cause of action. The first triable by the Court; the second and third by a jury. The second and third were tried and found for the plaintiff. *Held*, that the plaintiff could not have judgment, until he had also succeeded on the first issue (b).

APPEAL from the Gibson Circuit Court.—Debt by M'Clure against Barker upon a writing obligatory for

(a) See 6 Blkf. 123; 7 *Id.* 272; 5 *Id.* 585. (b) See 17 Ind. 183.

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the payment of 200 dollars. The obligation appeared, on oyer, to be joint and several, and to have been executed by Prince, Sloan, and Barker. Three pleas: first, a former recovery against all the obligors. Replication to this plea, that M'Clure did not recover judgment against the three obligors, as appears by the record; and that no such judgment does or ever did exist; and this he is ready to verify. Second plea, that Sloan and Barker were sureties for Prince in the obligation; that after the same became due, Prince and Sloan appeared in Court, and, by agreement with M'Clure, confessed judgment in his favor for the amount due on the obligation, which judgment is still in force; and that M'Clure gave Prince the further time of six months within which to pay the judgment. This plea was demurred to, but, the Court considering it good, the plaintiff withdrew his demurrer, and replied denying that he had given further time for payment as the defendant had alleged. Issue on this replication. Third plea, payment. Replication in denial, and issue.

Verdict and judgment for the plaintiff below.

HOLMAN, J.—A bill of exceptions shows, that the defendant offered parol evidence in support of his second plea,—that the plaintiff did give further time for payment as pleaded; but the plaintiff objected to the evidence, on the ground that if such further time was [*15] given it could be proved *by written evidence only; and the Court sustained the objection, and rejected the evidence (1).

The rejection of this evidence is the most prominent feature in the case. It is justified by the defendant in error, on the ground that the plea is no bar to the action. The plea can not be supported. We have seen no case where the single fact of taking a judgment of the principal, and giving a stay of execution, was of itself a release of the surety, either in law or equity. The doctrine

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relied on from 1 Maddock, 234, is founded on *Rees v. Berrington*, 2 Ves. Jr. 540. That case is, that if the obligee in a bond takes a note from the principal, and gives further time for payment, without the surety's knowledge, the surety is released in equity. It is also laid down in the same case, that if the creditor is called upon by the surety to sue for his demand, and does sue and get judgment, but gives a stay of execution without the surety's knowledge, the surety is released. This is the strongest case in the defendant's favor that we have seen in the chancery reports; and the present plea falls short of this case in two important particulars. First, this judgment seems to have been confessed without any previous process; so that it does not appear but that, after the expiration of the six months, execution might have issued as soon as it could have issued if there had been no agreement, and the regular course of preparing the suit for trial had been pursued. But the most important defect in the plea is, that it does not appear that the further time of payment was given without the knowledge of Barker. So that, even in equity, where sureties are chiefly recognized and peculiarly favored, Barker's plea would have availed him nothing (2). But chancery is the proper tribunal to grant relief in those cases, for there the particular circumstances of each case can be set forth. This may sometimes be done in equitable actions at law; but the general principles of common law, relative to writings obligatory, know nothing of sureties.

An act of assembly has provided a method to be pursued by sureties, who are apprehensive of danger by the delay of the creditor, but it is not pretended that Barker has pursued that method.

The plea is, therefore, no bar to the action; and the issue formed upon it is immaterial. If that issue had been found for the defendant, a repleader should
[*16] have been awarded. *The rejection of the evidence was, therefore, no injury to the defendant,

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inasmuch as the proving of the plea could have legally availed him nothing.

The replication to the first plea is informal. It is not a regular nul tiel record. But the existence of a judgment on record, in favor of M'Clure against Prince, Sloan and Barker, is substantially put in issue by it. This issue has not been determined. The record says, the jury "*were well and truly sworn to try, &c.*" What the clerk intended to include under the "*&c.*," is left to conjecture; and we hope that it is the last time so important a feature in the record shall be left to conjecture. But taking this as it is, and striking out the "*&c.*," and inserting the word "*issues*," it can not be contended that the jury were sworn to try any issues but those that were proper for a jury to try. The first issue, depending on matter of record, could not be supposed to be before the jury. That was to be determined by the Court, on inspecting the record, if any was produced. The verdict of the jury is a finding for the plaintiff generally, and determined only the second and third issues: and the judgment of the Court is upon the verdict of the jury, and has no reference whatever to the first issue. It remains undetermined, and final judgment should not have been given, until the Court had determined whether there was or was not such a record, as the defendant had alleged in his first plea.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Hall, for the appellant.

Tabbs, for the appellee.

(1) The Court can only look to the judgment itself for the terms under which it was confessed. If the agreement to stay execution be not entered of record, but exist merely by parol, it can not avail against the record.

To an action on a recognizance of bail, the defendant pleaded that, without his privity, the plaintiff had agreed to take security from the principal. This plea, on demurrer, was held to be insufficient at law, on the ground that an agreement by parol can not be pleaded in bar of an obligation by record. *Bulteel v. Jarrold*, 8 Pri. 467.

Vide, also, the cases of *Davey v. Prendergrass* and *The United States v.*

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Howell, referred to in note (2) to *Braman v. Howk*, Vol. 1 of these Rep. 394.

(2) In an action by the indorsee against the indorser of a bill, it was held that the defendant was not discharged by the plaintiff's having taken from the acceptor a cognovit giving three weeks' time, which was a period short of that time in which judgment could have been obtained against him. *Jay v. Warren*, 1 Carr & Payne, 532.

[*17] *A motion was made for an injunction to restrain the defendant, the administrator of A., from proceeding at law against the plaintiff, on a bond given to the intestate by B. and the plaintiff as his surety. The facts on which this motion was founded were, that in June, 1817, A. sued B. on the bond, and in the same month took a cognovit from him for the debt, with a stipulation that judgment should not be entered up, nor execution issued, until the 1st of August following. This proceeding, it was contended, was a giving of time to the principal, which discharged the surety. Per the Vice Chancellor.—“The principle of discharging a surety by the giving of time by the creditor, is a refinement of a Court of equity; and I will not refine upon it. By the arrangement complained of, time was not given, but the remedy was accelerated.” *Hulme v. Coles*, 2 Simons, 12.

On the 12th of February, pending a suit in which special bail had justified, the defendant gave a cognovit for the payment of the debt by three instalments; the first payable on the 26th of February instant; the others within two or three months afterwards, with a stay of execution until default. The first instalment not being paid, the plaintiff signed judgment on the 27th of the same month of February. Part of the money was made on a fi. fa. A ca. sa. was issued for the residue, and returned non est inventus. Debt was then brought against the bail on the recognizance; and they moved to set aside the proceedings against them. The ground of the motion was, that the bail were discharged by the cognovit. Per TENTERDEN, C. J.—“We are clearly of opinion, that bail are not discharged by the plaintiff's taking a cognovit from their principal without their consent or knowledge, unless, by the terms of the cognovit, he is to have a longer time for the payment of the debt and costs than he would have if the plaintiff had proceeded regularly in the action.” *Stevenson v. Roche*, 9 Barn. & Cress. 707.

There is a still later case to the same effect; in which Bayley, J., says—“It is a well established rule that a cognovit by the principal, without notice to the bail, does not discharge them, unless time be given, to the former beyond that in which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause.” *Price v. Edmunds*, 10 Barn. & Cress. 578.

A surety, having been applied to by the solicitors of the creditor for payment, told the principal to see the solicitors and do the best he could with them. The principal, accordingly, went to the solicitors and made an arrangement with them for further credit. The surety contended that this arrangement discharged him. But the chancellor held, that, as the ar-

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rangement was made under the surety's authority, he could not be relieved. *Tyson v. Cox*, 1 Turner, C. C. 395.

It appeared that the holder of a bill, of which payment had been refused, informed the drawer of his intention to take from the acceptor security for payment by instalments, and the drawer answered that the holder might do as he liked, for he was discharged already in consequence of the want of notice; when in fact he was not discharged—due notice having been given. *Held*, that the drawer was not discharged by the plaintiff's giving time, under those circumstances, to the acceptor; because his answer was thought to amount to an assent to the plaintiff's taking the warrant of attorney from the acceptor. *Clarke v. Devlin*, 3 Bos. & Pul. 363.

Vide, also, as to the effect of giving time to the principal without the surety's consent. Theobald on Prin. and Sur. 127-129; Note (2) to *Braman v. Hawk*, Vol. 1 of these Rep. 394.

[*18] **M'GRUDER v. RUSSELL, Sheriff, &c.*

ESCAPE—SHERIFF OF SUPREME COURT.—A ca. sa. on a replevin-bond in the Supreme Court, was, by the sheriff thereof to whom it was directed, sent to the sheriff of Jackson county, where the execution-defendant resided. The sheriff of that county arrested the defendant, and afterwards suffered him to escape. *Held*, that, under the statute, the sheriff of the Supreme Court was not liable for the escape.

SAME—REMOVAL.—The sheriff of Jackson county, after the escape, retook the defendant in that county, and brought him to the seat of government, where the Supreme Court sits. *Held*, that the removal of the defendant out of the county in which he was arrested was an escape.

SHERIFF OF SUPREME COURT—SERVICE BY—PRACTICE.—The process of the Supreme Court is, by statute, directed to the sheriff of that Court, who receives the same and forwards it, with his mandate, to the sheriff of the county in which it is to be executed. The sheriff of the proper county makes his return to the sheriff of the Supreme Court, and the latter returns it to that Court.

SAME—NOT LIABLE FOR ACTS OF COUNTY SHERIFF.—The general doctrine is, that a sheriff is liable for the acts of his deputy. But as the authority of the sheriffs of the several counties to execute the process of the Supreme Court, is neither conferred by the sheriff of that Court, nor subject to be revoked or abridged by him—he is not liable for their conduct.

ERROR to the Marion Circuit Court.

BLACKFORD, J.—Debt by M'Gruder against Russell, sheriff of Marion county, for an escape. Plea, nil debet. Special verdict to the following effect:—

M'Gruder, at the May term, 1821, of the Supreme Court, recovered judgment against Tate, and took out an execution of fieri facias. Replevin-bond by Tate with Craig as surety. Ca. sa. directed to Russell, sheriff of Marion county, against Tate alone, upon the replevin-bond; Craig having died since its execution. Russell sent the ca. sa. to Stanly, sheriff of Jackson county, where Tate resided. Stanly arrested Tate in October, 1825, and suffered him to go at large until the November following, when Elliott, acting for Stanly, again arrested Tate on the ca. sa. and conveyed him to Indianapolis, and offered to deliver him to Russell. Russell refused to receive him; and, upon a writ of habeas corpus, he was finally discharged. Upon these facts, if the law is in favor of the plaintiff, the jury find for him 738 dollars and 13 cents debt, and 158 dollars and 46 cents damages; otherwise they find for the defendant.

The Circuit Court gave judgment, upon the verdict, in favor of the defendant.

[*19] *With respect to the fact of an escape in this case, there is no doubt about that. It is expressly found by the jury, that an escape had been suffered, before the execution-debtor had been taken from the county of Jackson. But had it been otherwise, the removal of the party out of the county in which he was arrested, was itself an escape. It was like the case of a bailiff of a liberty, taking the party out of the liberty to the county gaol, and delivering him to the sheriff, which has been adjudged an escape. *Boothman v. Earl of Surry*, 2 T. R. 5.

The only question which the case presents, is, whether an action for this escape can be maintained against Russell, the sheriff of Marion county? If Russell is the principal sheriff for the state, as respects the process of the Supreme Court, and the sheriffs of the different counties are merely his deputies; and if the decision of the case is

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to rest strictly upon the common-law doctrine of principal and agent; no doubt can exist but that for the escape suffered by Stanly, Russell alone is responsible to the plaintiff. *Cameron v. Reynolds*, Cowp. 403. By the statute of 1824, p. 129, which governs this case, the sheriff of the county where the seat of the state government is located, is to act as sheriff of the Supreme Court, and the sheriffs of the several counties are to act as his deputies, and are responsible to him (1). It must be remarked, that the authority of the sheriffs of the respective counties, is not conferred by the sheriff of the Supreme Court; nor can such authority when conferred, be revoked or abridged by him. They are elected by the people at stated periods, and act in their own names, as independent officers of their respective counties, not in the name of the sheriff of the Supreme Court in any case whatever. Under these circumstances, the sheriff of the Supreme Court can not, in our opinion, be liable for the conduct of the other sheriffs in the different counties, unless made so by the express words of the act of assembly. There is certainly no such direct statutory provision: it would be very unreasonable if there were.

The law of the state, upon the subject before us, we conceive to be this. The process of the Supreme Court is directed by the clerk, to the sheriff of the Supreme Court. He receives and forwards it, with his mandate, to the sheriff of the county where it is to be executed. The sheriff of the proper county makes his return to the sheriff of the Supreme Court, from whom he received it; and the latter returns it to the Supreme Court, from whence it issued. The practice, in this respect, may be assimilated to that which prevails in an English county, where there is a bailiff of a liberty. The writ is directed to the sheriff; he makes out his mandate to the bailiff of the liberty; the bailiff executes it and makes his return to the sheriff; and the sheriff returns it to his Court. If the writ be a *ca. sa.*, the bailiff must

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confine the party in the gaol of the liberty; and should he suffer him to escape, an action lies against the bailiff, but not against the sheriff. 2 Bac. 519. When the sheriff has nothing to do with the choice of the bailiff or his sureties, he can not, upon any principle of the common law, be made responsible for his acts; nor can he be considered so liable, by virtue of any statutory provision, where there are no express words to that effect.

Per Curiam.—The judgment is affirmed with costs.

Dewey and Hawk, for the plaintiff.

Fletcher, Rariden and Nelson, for the defendant.

(1) This statute is repealed. The sheriff of the Supreme Court is now appointed by the Court for the term of three years. He appoints his deputies in different parts of the state, and is expressly made responsible for their acts. Stat. 1833, p. 47.

DUKES v. CLARK.

SLANDER—INCEST—CHARGE OF FORNICATION WITH WIFE'S SISTER.—Slander for charging a man with illicit intercourse with his wife's sister. *Held*, that the words did not contain a charge of incest, but only of fornication or adultery. *Held*, also, that as, at the time of speaking the words, neither fornication nor adultery was an indictable offence, the words were not actionable.

ERROR to the Monroe Circuit Court.

SCOTT, J.—Clark filed his declaration in the Circuit Court, in which he charged Dukes with having spoken of him certain slanderous words, which, as he alleges, import a charge of incest. Plea, not guilty; verdict and judgment for the plaintiff.

On an inspection of the declaration, we find that the words, as laid, strongly imply a charge against Clark of an illicit intercourse with his sister-in-law. Such [*21] an intercourse, however, *is not incestuous; and there are no words laid in the declaration, which

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imply a charge of the crime of incest. In their strongest import, they imply no more than fornication or adultery. And as, at the time of speaking the words, a man was not liable to an indictment for fornication or adultery, we are clearly of opinion that the words, as laid, are not a sufficient foundation for an action of slander. The judgment is, therefore, erroneous, and must be reversed (1).

Per Curiam.—The judgment is reversed with costs.

Naylor, for the plaintiff.

Wick, for the defendant.

(1) Where an action was brought for words, in calling the plaintiff *heretic* and one of the *new learning*, it was held clearly that it would not lie, being merely a spiritual matter; for if the defendant was disposed to justify and show in what respect the plaintiff was a heretic, the temporal Court could not judge of it; and it was not like where the court had cognizance of the principal matter, as where a man was called traitor, or felon. Again, if he had called him *adulterer*, this being a spiritual matter, an action would not lie for it. But Fitzherbert said, that where things were of a mixed nature, as where a man was said to keep a bawdy-house, he might elect whether he would have his action here or in the spiritual Court. 27 Hen. 8-14; Reeves' Eng. Law, 385. The following is the language of Blackstone: In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were upon a second conviction made felony without benefit of clergy. But at the Restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigor. And these offences have been ever since left to the feeble coercion of the spiritual Court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing, perhaps, to the constrained celibacy of its first compilers. The temporal Courts, therefore, take no cognizance of the crime of the adultery, otherwise than as a private injury. 4 Bl. Comm. 65.

Many offences of private incontinence fall properly and exclusively under the jurisdiction of the ecclesiastical Court, and are appropriated to it. But where the incontinence or lewdness is public, or accompanied with conspiracy, it is indictable.

Exposing a party's person to the public view, is an offence *contra bonos mores* and indictable. See 1 Sid. 158; 2 Camp. 89; 1 Kep. 620. And by

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the vagrant act, 5 Geo. 4, exposing a man's person, with intent to insult a female, is an offence for which the offender may be treated as a rogue and vagabond; and so is the wilfully exposing an obscene print or indecent exhibition,—indeed this would be an indictable offence at common law. 2 Stra. 789; 1 Barn. Rep. 29; 4 Burr. 2527, 2574. And by the same act, G. 4, every common prostitute wandering in public, and behaving in a riotous and indecent manner, may be treated as an idle and disorderly person within the meaning of that act.

Publicly selling and buying a wife is clearly an indictable offence. [*22] 3 Burr. 1438. *Procuring or endeavoring to procure the seduction of a girl seems indictable. 3 St. Tri. 519. So is endeavoring to lead a girl into prostitution. 3 Burr. 1438; 4 Chitt. Bl. 65, note (25).

Vide *Shields v. Cunningham*, Vol. 1 of these Rep. 86, and note (3); *Henson v. Veatch*, Idem, 371, note (1).

The living in open and notorious adultery or fornication, or being guilty of open and notorious lewdness or of any grossly scandalous and public indecency, is now punishable in Indiana by statute. R. C. 1831, p. 192. And words charging a female with fornication, &c., or charging *any person* with incest, sodomy, &c., are expressly made actionable by statute. R. C. 1831, p. 407.

POLLARD v. ROWLAND, in Error.

POLLARD, the holder of two promissory notes against Fullenwider, put them in the hands of Rowland, an attorney at law, to be collected from the maker. The following receipt was given for the notes: "Received of E. Pollard one note on H. Fullenwider for 100 dollars in land-office money, dated 21st Aug. 1820, and due the first of May then next; also one note on said Fullenwider for 100 dollars and 37 cents, payable in leather to be delivered four miles from Bloomington, on or before the 15th Nov. 1820, to collect. I am to receive the customary fees when the money is collected, and if it is never collected then a reasonable fee for my trouble.—J. Rowland." Fullenwider's residence was forty miles from Rowland's, and in a county in which Rowland did not practice law. Rowland, without Pollard's knowledge, sent the notes for collection to Stephen, an attorney at law, and resident in

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the same county with Fullenwider. Stephen, without delay, obtained judgment against Fullenwider on the notes; and issued a fieri facias thereon, which was returned nulla bona. A few months afterwards, Stephen, as attorney of Pollard, received from Fullenwider the amount of the judgment—part in cash and part in property—which he converted to his own use.

Held, that Rowland was accountable to Pollard for the acts of Stephen in the business, to the same extent that Stephen himself was; and that he could make no defence to the suit of Pollard on the premises, which Stephen could not make were he sued by Pollard.

[*23] **Held*, also, that though Rowland could not, under the circumstances of the case, be made liable to Pollard, for negligence or a want of skill in the management of the business; yet that he was liable to the suit of Pollard in consequence of Stephen's collection of the money due from Fullenwider to Pollard, and of the non-payment of the same by Stephen to Pollard (1).

(1) There was another point decided in this case, but which, having been since overruled, is not here noticed.

A suit can not be maintained against an agent for money collected for his principal, nor against an attorney at law for money collected for his client, until after the money has been demanded. *Armstrong v. Smith*, May term, 1833; *Judah v. Dyott*, November term, 1833. Post.

An attorney is not liable for a mistake in a point of law on which reasonable doubt may be entertained. *King v. Burt*, 1 Nev. & Man. 262.

MEEK v. RUFFNER.

ABATEMENT—DEATH OF PLAINTIFF—COMMON LAW.—To an action of assumpsit by two plaintiffs, the defendant pleaded in abatement that one of the plaintiffs had died since the commencement of the suit. *Held*, that, at common law, the plea was good.

SAME—CODE—PRACTICE.—The statute of 1825 changed this law, and authorized the suit to proceed in the name of the survivor, if the cause of action survived, upon a suggestion on record of the other's death

Meek v. Ruffner.

ERROR to the Jefferson Circuit Court.

BLACKFORD, J.—Assumpsit by Jacob Baymiller and Joseph Ruffner, against John Meek and William H. Hopkins. Suggestion entered of record, that Hopkins was no inhabitant, as returned by the sheriff. Plea in abatement by Meek of the death of Baymiller, one of the plaintiffs, since the commencement of the suit. Ruffner suggested of record the death of Baymiller; and, upon his motion, the defendant was ruled to plead. Plea, non assumpsit. Verdict and judgment for the plaintiff.

By the common law, if one of several plaintiffs died before final judgment, the suit was thereby abated. Ham. on Parties, 225. The statute of 8 and 9 Will. 3, changed that law, and authorized the suit to proceed in the name of the survivor, if the cause of action survived, upon a suggestion on record of the other's death. Ibid. This

statute, however, was never in force here. We [*24] have now *a similar statute; Stat. 1825, p. 50; but

the judgment in this case was prior to the existence of that statute. This cause, therefore, must be governed by the common law, and the defendant had a right to plead the death of Baymiller in abatement. The Court, by disregarding that plea and ruling the defendant to plead again, committed an error; and the judgment must be reversed (1).

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the rule to plead inclusive are set aside, with costs. Cause remanded, &c.

Nelson, for the plaintiff.

Douglass, for the defendant.

(1) 2 Will. Saund. 72, i, note. The reason of the common-law rule is, that the plaintiffs, by joining in the suit, assert a *joint* right of recovery, which, as such, is destroyed by the death of either of them. Gould's Pl. 265. Our present statute, which is a copy of the statute of 1825, and substantially the same with the 8 and 9 Will. 3, is as follows: "If, in any action, there be two or more plaintiffs or defendants, and one or more of them should die, the action shall not be thereby abated, if the cause of such action survive, but such death being suggested upon the record, the action

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shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants." R. C. 1831, p. 410.

The suggestion, when one of the plaintiffs dies pending the suit, is made as follows: At which day, before our said Court, come here as well the said Ruffner, by his said attorney, and the said Meek, by his said attorney, and the said Baymiller comes not; and the said Ruffner hereupon gives the said Court here to understand and be informed, that since the suing out of the original writ in this cause [or, after the last continuance of the plea aforesaid] and before this day, to wit, on, &c., the said Baymiller died, and the said Ruffner then and there survived him; which the said Meek does not deny, but admits the same to be true. And the said Ruffner, &c., [proceeding in his name alone.] Arch. Forms, p. 561.

The GOVERNOR, for the use of GILL, v. STRIBLING and Others.

WRIT—VOID—UNCERTAINTY OF PARTY TO BE ARRESTED.—A *capias ad respondendum* was issued against Taylor & Searles requiring bail. Upon this writ the sheriff arrested David S. Taylor, but took no bail and permitted him to escape. *Held*, that the sheriff committed no breach of duty in this discharge of Taylor, although the person intended by the name of Taylor in the writ was David S. Taylor.

ERROR to the Jefferson Circuit Court.—This was an action of debt brought in the name of the governor, for the use of Gill, founded on a sheriff's bond, in [*25] which action Stribling, the *sheriff, and his sureties were defendants. Issue was joined upon the performance of the condition of the bond. Verdict and judgment for the defendants.

BLACKFORD, J.—The facts stated in the declaration, to make out a breach of the condition, are, that Gill took out and delivered to Stribling, as sheriff, a *capias ad respondendum* against Taylor & Searles, requiring bail; that he intended by Taylor & Searles, David S. Taylor and David Searles; that the sheriff arrested David S. Taylor, but did not take bail, and voluntarily permitted him to escape.

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These facts constitute no breach of the condition of the bond. Upon a writ against Taylor, without any other description, the sheriff was not bound to arrest David S. Taylor, nor, after arresting him, was he bound to detain him. It was impossible for the sheriff, from such an imperfect description, to know that David S. Taylor was intended.

The record, therefore, shows that the plaintiff had no cause of action; and he has no right to complain of the judgment against him (1).

Per Curiam.—The judgment is affirmed with costs.

Nelson, for the plaintiff.

(1) The party whom the plaintiff intended to arrest must be correctly described in the process; if he be not, the process is no justification for the arrest of such person. Thus, to trespass for false imprisonment brought by A., the defendant pleaded that B. sued out a lilitat against the plaintiff A., therein called by the name of C., directed to the sheriff, &c., authorizing him to arrest C.; that the sheriff directed his warrant to the defendant, commanding him to take the said A. *therein called by the name of C.*; averment, that A. and C. named in the writ and warrant are *one and the same person*. This plea, or general demurrer, was held to be bad. *Shadgett v. Clipson*, 8 East. 328. So, to trespass for taking A.'s goods, the officer pleaded that he took them under a distringas against B., meaning the said A.. to compel an appearance; averring that A. and B. were the same person, (A. had not appeared in the original action.) *Held* on demurrer, that the plea was bad. *Cole v. Hindson*, 6 T. R. 234. So, where Daniel S. Griswold was arrested on process of attachment issued out of the equity side of the Circuit Court of the United States against Samuel S. Griswold, it was held that an action of false imprisonment lay by Daniel S. Griswold against the marshal, his deputy, and the solicitor concerned in the arrest; and that this was so, though Daniel S. Griswold was the person intended. *Griswold v. Sedgwick*, 6 Cowen, 456. S. C. 1 Wend. 126.

[*26] *The GOVERNOR, for the use of NEWMAN, Administrator, v. SHELBY, Administratrix.

EVIDENCE—JUDGMENT AGAINST CO-OBLIGOR.—In a suit against the administratrix of A. on a bond in which he was surety for B. as sheriff.

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a judgment previously obtained against B. on the same bond is inadmissible as evidence for the plaintiff (*a*).

SAME.—If the administratrix, being sued on the bond, had given notice of the pendency of the suit to B., and there had been judgment against her, that judgment would have been conclusive against B. in a suit against him by the administratrix.

SAME—SURETY BOUND BY JUDGMENT AGAINST PRINCIPAL.—If a devastavit be established against an administrator, his sureties can not afterwards controvert the devastavit (*b*).

SAME—INSTRUCTION AS TO INSUFFICIENCY.—The Court can not give an unqualified charge to the jury, that the evidence is insufficient to support the action, unless in cases where it would be bound to set aside the verdict if for the plaintiff (*c*).

ERROR to the Clark Circuit Court.

HOLMAN, J.—Debt on a sheriff's bond, brought by the governor for the use of Newman, administrator of Hancock deceased, against M. Shelby, administratrix of E. Shelby, deceased, one of the sureties of Weathers, late sheriff of Clark county. The breach assigned is, that Weathers failed to return an execution in favor of Hancock against A. Sumner, administratrix of W. B. Sumner, deceased, which issued from the clerk's office of the Clark Circuit Court on the 10th of September, 1817, and was placed in the hands of Weathers, as sheriff, for collection. And it is averred, that Newman, administrator of Hancock, deceased, recovered a judgment against Weathers for failing to return said execution; and that an execution issued against Weathers on the judgment, and was returned nulla bona. Pleas, first, that no execution—issued from the clerk's office of the Clark Circuit Court in favor of Hancock against A. Sumner, administratrix of W. B. Sumner, deceased, on the 10th of September, 1817—was ever placed in the hands of Weathers for collection; secondly, that the supposed execution did not contain any command to the sheriff to make a return thereof. Verdict for the defendant. Motion for a new

(*a*) See Post 222, 289; 3 Blkf. 104. (*b*) See 1 Ind. 105, 538; 5 *Id.* 262.
 (*c*) See 42 Ind. 574; 56 *Id.* 296; 18 *Id.* 502; 8 Blkf. 256.

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trial overruled. Bill of exceptions. Judgment for the defendant.

The bill of exceptions set forth the whole of the evidence, and the instructions of the Court to the jury.

The plaintiff introduced the execution-docket [*27] of the Clark *Circuit Court, in which the issuing of the execution was entered in the ordinary form, except that the column which contained the species of execution was filled with the words "order of sale." He introduced J. Shelby, the clerk of the Court at the time of making said entry in the execution-docket, who testified—that Weathers was sheriff in September, 1817—that he was in the habit of delivering to Weathers executions generally—that his practice was to make out executions, and put them in a bundle on the table in his office, where Weathers received them—that when he handed executions to the attorneys or other persons besides the sheriff, he noted in the execution docket to whom they were delivered—that it appeared from the docket in this case that no note or mark was made to show that the execution was delivered to any person—that when executions remained in the office, he made a remark to that effect in a column of the execution-docket—that though it was possible this execution had been delivered to some other person, and had never come to the hands of Weathers, yet he concluded he had delivered it to him from an inspection of the execution-docket—that he never issued an execution without inserting a return day—that he never issued but two or three orders of sale, and did not recollect whether they were returnable to a particular day or not—that the execution-docket in this case showed a regular return day—and that the column left for the insertion of the return still remained a blank.

The plaintiff, also, offered in evidence the judgment in favor of Newman against Weathers, for failing to return

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the execution mentioned in the declaration. This evidence was objected to, and the objection sustained.

The Court instructed the jury, that the evidence was insufficient in law to maintain the action.

The errors assigned are, first, that the Court erred in their refusal to permit the judgment against Weathers to be given in evidence; secondly, that they erred in their instructions to the jury.

In support of his first position, the plaintiff relies on the case of *Kip v. Brigham*, 6 Johns. R. 158, and on the case of *The Associate Judges of Clark County v. Wilson* (1). Neither of these cases is analogous. In *Kip v. Brigham*, the sheriff had taken a bond with surety from [*28] a prisoner for the gaol liberties; the *prisoner escaped; and the sheriff was sued for the escape. The sheriff gave notice of the suit to the prisoner's sureties. They attended at the trial and aided the sheriff in his defence; but judgment was given against the sheriff. In a suit by the sheriff against the sureties for this escape, the judgment against the sheriff was held to be conclusive against the sureties. In that case, the sureties were the only persons really liable. The sheriff, though liable to the action in the first instance, was entitled to a remuneration from the sureties for all the damages he sustained. The sureties having notice of the first action, and having assisted in the defence, were not afterwards permitted to controvert the facts established by the first judgment. The case of *Blasdale v. Babcock*, 1 Johns. R. 517, goes still further, and fixes the conclusiveness of the judgment against the party ultimately bound, not on the circumstances of his aiding in the defence, but on the fact of his having notice of the first action. See, also, *Bender v. Fromberger*, 4 Dall. 436; *Hamilton v. Cutts*, 4 Mass. 349.

But the present case is entirely dissimilar. This is a claim against two co-obligors, who, so far as the plaintiff is concerned, are subject to the same liabilities. The

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judgment against the one concludes nothing against the other in behalf of the plaintiff, even if that other had notice of the first action, which, it seems, was not the case in this transaction. If Shelby had been sued alone, and had given notice to Weathers of the pendency of the action, and judgment had been given against him; that judgment, agreeably to the foregoing cases, would have been conclusive against Weathers, in a suit by Shelby against Weathers for the amount he was thus compelled to pay on account of the official default of Weathers; but it would have concluded nothing in behalf of the plaintiff against Weathers.

The case of *The Associate Judges of Clark v. Wilson* is equally inapplicable. The point there determined is, that when a devastavit has been established against an administrator by a regular judgment, the sureties are not permitted to controvert that fact. The law has placed the sureties of executors and administrators on a different footing from other sureties and co-obligors in general. They are not liable on the administration-bond, until a devastavit is judicially established; and, as the question

of a devastavit is all that is controverted in the [*29] *suit against the executor or administrator, the

decision is conclusive not only against the executor or administrator, but against the sureties also. But the sureties of a sheriff have no such indulgence. They are liable to be sued on the sheriff's bond in the first instance, either with or without the sheriff, before anything has been determined as to the sheriff's default. Weathers and Shelby are in the same situation as other co-obligors; and the general rule is—that a judgment is evidence between the same parties, on the same subject, and all persons claiming under them; but that it does not extend to strangers, who have no opportunity of examining witnesses, making defence, or appealing to a higher tribunal. 1 Phil. Ev. 222. So that Shelby could

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not be bound by the judgment against Weathers, nor in any manner affected by it.

With regard to the instructions of the Court, it may be observed that the testimony is not conclusively defective. And before a court is authorized to give an unqualified charge to the jury, that the evidence is insufficient to support an action or a defence, there should be some absolute deficiency in the testimony, which could not be supplied by intendment or inference; as where some important fact was not proved at all. The jury being the constitutional judges not only of facts, but of the weight and extent of the evidence, they should be left in the unbiassed possession of every case, where there is evidence that conduces to prove every material fact in the case. When a party is unwilling to trust his case to a jury, he may demur to the evidence, but where the case is submitted to the jury, he is not entitled to the instruction of the Court in his favor, on the weight and extent of the testimony, in every case where, on a demurrer to evidence, he would be entitled to a judgment. The Court should not give an unqualified charge to the jury that the evidence is insufficient, in every case where it would grant a new trial if a verdict was found contrary to its opinion. Such a charge should be given in such cases only where, if a verdict was found differently, the Court would be absolutely bound by law to set it aside. The testimony in this case is not of such a decisive character, that, if the jury had found a verdict for the plaintiff, the Court would have been absolutely bound to set it aside.

The point where the testimony seems most defective, is, as to the nature *of the process that issued in the case of *Hancock v. Sumner*. The breach assigned in the sheriff's bond is for failing to return an execution; and the process that issued seems to have been an order of sale. There are but a few cases where final process issues under the name of "orders of sale;" and these orders of sale are in the nature of executions,

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and subject to the same regulations; and where they differ in nothing but name from a venditioni exponas, we see no particular evil that can arise from permitting them to be described by the general term of executions. If this order of sale was not different in its nature from an execution, and we have some reason to believe it was not, the description of it in the declaration is such as to preclude the idea that the defendant was surprised by its being termed an execution, or that he would be liable to another action for the same cause. Taking the whole of the testimony together, we think it far from certain that the jury might not infer from it, the issuing of the execution, the delivering of it to Weathers, and his failure to return it. So that, although it may be extremely doubtful whether the plaintiff ought to recover or not, yet in order to give him the benefit of a jury trial, and to give the jury the full exercise of their powers, the case should be left with the jury to draw their own inferences from the testimony.

Per Curiam.—The judgment is reversed, and the verdict set aside. Cause remanded, &c.

Naylor, for the plaintiff.

Hawk and *Dewey*, for the defendant.

(1) Vide Vol. I. of these Rep. 344.

[*31] *ELLIOTT and Another v. RAY, in Error.

JUDGMENT, ACTION ON (a).

THE general doctrine is, that an action of debt can not be sustained on a decree in chancery. *Jones v. Bradshaw*, Cas. Temp. Talb. 223; 3 P. Wms. 401, note f; *Hugh v. Higgs*, 8 Wheat. 697.

An action of debt will not lie on the decree of a Court

(a) See post, 82; 3 Blkf. 375; 4 *Id.* 53; 6 *Id.* 337; 16 *Ind.* 46.

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of chancery in another state, unless the decree have, by the statute of that state, the force and effect of a judgment at law (1).

If the decree have such effect by statute, that fact should be averred and proved; the statutes of other states not being noticed here without proof (2).

(1) It is enacted, by a recent statute, that money due by a final decree of a Court of equity, without this state, may be recovered in an action of debt. Stat. 1833, p. 112.

(2) Vide *Stout v. Wood*, Vol. I. of these Rep. 71; *Cone v. Cotton*, Nov. term, 1827, post.

The statutes of one of the states, unless pleaded, can not be noticed by the Courts of another state. *Walker v. Maxwell*, 1 Mass. 104; *Pearsall v. Dwight*, 2 id. 84; *Legg v. Legg*, 8 id. 99; *Beauchamp v. Mudd*, Hardin, 163. To entitle such statutes to judicial notice in another state, they must be proved. *Tarlton v. Briscoe*, 4 Bibb. 73; *Talbot v. David*, 2 Marsh. 609; *Church v. Hubbard*, 2 Cranch. 186; *Thompson v. Ketcham*, 8 Johns. R. 189; *Hosford v. Nichols*, 1 Paige, 220, 226. By act of congress, "the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto." Gord. Dig. 940. And it has accordingly been held, that a statute of one state is not admissible in evidence in the Courts of another, unless it be so authenticated. *Craig v. Brown*, 1 Peters, C. C. R. 352; *State v. Twitty*, 2 Hawke. 441. But, in Pennsylvania, copies of the statutes of another state, contained in a book purporting to contain the laws of such state, and to be printed by the public printer, are admissible in evidence. *Thompson v. Musser*, 1 Dall. 462; *Biddis v. James*, 6 Binn. 321. So, in Massachusetts. *Raynham v. Canton*, 3 Pick. 293. So, in Vermont. *State v. Stade*, 1 Chip. 303. The statute-book of another state, printed by a private printer, is not admissible in Connecticut. *Bastwick v. Bogardus*, 2 Root, 250.

The written law of a foreign state must be proved by a copy duly authenticated. *Clegg v. Levy*, 3 Campb. 166. The unwritten law of a foreign state may be proved by the parol evidence of witnesses professing professional skill. *Miller v. Heinrick*, 4 Campb. 155, per GIBBS, C. J. Vide *Roscoe on Ev.* p. 60.

Copies of the statutes of Great Britain and Ireland prior to the Union, printed by the king's printer, are received mutually as conclusive evidence of the several statutes in the courts of either kingdom. Stat. 41 Geo. 3.

Particular customs and private statutes, like the statutes of other [*32] states, and *foreign laws, being no part of the general law of the land, must be set forth in the pleading of the party relying on them. They are pleaded as matters of fact; and their existence may be denied by plea. When denied, they must be proved as other facts are proved. Gould's Pl. 56; 1 Chitt. Pl. 218; Steph. on Pl. 252.

Doe, on the Demise of Wayman v. Naylor.

DOE, on the Demise of WAYMAN v. NAYLOR.

JUDICIAL SALE—RENTS AND PROFITS—REALTY.—By the statute of 1817, real estate might be sold on an execution of fieri facias, without an inquiry as to the value of the rents and profits, or a venditioni exponas; unless the execution-defendant required an inquest.

CONSTITUTIONAL LAW—EFFECT OF REPEAL.—If a statute be repealed, and the repealing act itself be afterwards repealed, the original act is revived (*a*).

JUDICIAL SALE—REALTY—RENTS.—The statute of 1821 supplied an omission in that of 1817, by authorizing a venditioni exponas and sale of land, where the rents and profits had been offered for sale, but would made a part of the record in some way known to the law (*b*).

SAME—ACT 1817.—A venditioni exponas was not necessary, under the statute of 1817, except in cases where there had been an inquest.

SAME—ACT 1810.—By the statute of 1810, an inquest and venditioni exponas were necessary without request.

DEED—ACKNOWLEDGMENT—EFFECT OF.—If a conveyance of real estate appears on its face to have been regularly executed, and its execution is attested by subscribing witnesses, it is admissible in evidence without a certificate of acknowledgment; an acknowledgment being essential to the admission of a deed of record, but not to its validity.

ERROR to Jackson Circuit Court.—Ejectment for a lot of ground in Brownstown, in which suit Wayman is the lessor of the plaintiff, and Naylor is the defendant. Plea, the general issue. The plaintiff proved that the defendant, being the owner of the lot in question, became replevin-surety of record for the payment of a judgment against Beatty in favor of Steele & M'Carty. He then after proof of the judgment, offered in evidence an execution of fieri facias against the defendant as the replevin-surety, the sheriff's return of the execution showing a sale of the premises to the lessor, and the sheriff's deed in conformity with the sale. This evidence was objected to by the defendant, and the objection was sustained. Verdict and judgment for the defendant.

BLACKFORD, J.—It is contended that the execution of fieri facias did not authorize the sale; but that an inquest

(*a*) 47 *Id.* 283. (*b*) See 19 *Ind.* 15.

Doe, on the Demise of Wayman v. Naylor.

to inquire as to the rents and profits, and a venditioni exponas, were also *necessary. By the second section of the act of 1818, subjecting real and personal property to execution, Stat. 1818, p. 185, an inquest and venditioni exponas were made necessary, *in cases where the defendant requested an inquest*. That section of the statute of 1818 was repealed in 1820. Stat. 1820, p. 113. This repealing act was itself repealed in 1821; Stat. 1821, p. 36; and consequently the second section of the act of 1818 was revived. The act of 1822, p. 81, is supplemental to the act of 1818, as amended by that of 1821, Stat. 1821, p. 3, and supplied an omission in the statute of 1818, by authorizing a venditioni exponas and sale, where the rents and profits would not sell for a sufficient sum to pay the debt.

The act of 1818, sec. 2, governs this case, which was in the year 1822; and as the record shows *no request for an inquest*, none was necessary; nor was a venditioni exponas necessary, which was only required when there had been an inquest. The fieri facias, therefore, must be considered as having warranted the sale.

The case of *Armstrong v. Jackson d. Elliott*, Nov. term, 1822, cited by the defendant, does not apply (1). That case was governed by the act of 1810, according to which the inquest and venditioni exponas were necessary *without request*.

The objection to the fieri facias and return, as evidence in this case, should have been overruled.

It is contended that the sheriff's deed had not been properly acknowledged, and was therefore inadmissible. The deed appears on its face to have been regularly executed, and its execution is attested by subscribing witnesses. An acknowledgment is necessary for the admission of a deed to record, but is not essential to its validity. The want of a proper certificate of acknowledgment was, therefore, no ground for rejecting the sheriff's deed.

Per Curiam.—The judgment is reversed, and the pro-

Riley and Another v. Harkness, in Error.

ceedings subsequent to the issue are set aside with costs. Cause remanded, &c.

Payne, for the plaintiff.

Naylor and Nelson, for the defendant.

(1) Vol. 1 of these Rep. 219.

[*34] *RILEY and Another v. HARKNESS, in Error.

PLEADINGS—NOT VERIFIED.

A SPECIAL plea of non est factum, alleging a material alteration of the bond without the obligor's consent, may, if not sworn to, be rejected on motion; but it can not be treated as a nullity (1) (a).

Two pleas in bar to the whole cause of action. An issue in law on one and of fact on the other. Verdict for the plaintiff. *Held*, that final judgment could not be rendered on the verdict, until the issue in law was disposed of (2) (b).

The plaintiff can not demur and reply to the same plea (3).

(1) The statute requires plea of non est factum to be sworn to. R. C. 1824, p. 292; R. C. 1831, p. 403.

(2) Foreedom. Several pleas in bar. Replication to the eighth plea, and demurrer to the replication. On the other pleas issues were joined. Judgment on the demurrer for the demandant. The demandant, afterwards, proceeded to trial on the other issues, and obtained a verdict. The entry on the record was as follows: "And hereupon all and singular the premises whereof the said parties have put themselves upon the judgment of the Court, being seen and by the justices here fully understood, and mature deliberation thereupon had, it appears to the said justices here that the replication of the said Francis Cholmeley, the demandant, to the said plea of the said Charles Cockerell and Henry Trail, the said tenants, by them eighthly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, is sufficient in law for the said

(a) 6 Blkf. 288. (b) 3 Blkf. 34.

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demandant to have and maintain his aforesaid action against them; but because it is unknown to the justices here, whether or not the said Charles Cockerell and Henry Trail, the said tenants, will be convicted on the trial of the said issues above joined between the parties aforesaid, to be tried by the country; therefore, let the giving of the judgment in this behalf be stayed until the trial of the said last-mentioned issues."

(Then after stating the venire facias, &c., and that, on the trial of the issues, the jury found the several issues joined in favor of the demandant, several continuances were entered, and lastly to the morrow of the Holy Trinity.)

"At which day come here the parties last aforesaid by their respective attorneys aforesaid, and hereupon all and singular the premises being seen, and by the said justices here fully understood, and mature deliberation being thereupon had, it is considered by the said justices that the said Francis Cholmeley do recover his seisin against the said Charles Cockerell and Henry Trail, of the manor and tenements aforesaid, with the appurtenances above demanded. And the said Charles Cockerell and Henry Trail in mercy, &c." *Cockerell et al. v. Cholmeley*, 10 Barn. and Cress. 564.

Vide, also, *Meylin v. Woodford*, Vol. 1 of these Rep. 286; *Fischli v. Cowan*, Ibid. 350; *Swan v. Rary*, Nov. term, 1833, post.

(3) Vide *Hair v. Weaver*, Vol. 1 of these Rep. 77; Steph. on Pl. 296.

[*35] * SERVER v. THE STATE, in Error.

PERJURY—AUTHORITY OF OFFICER.

IN an indictment for perjury, the oath said to be false was charged to have been administered in the Circuit Court by S. C. as deputy clerk. *Held*, that no proof of the appointment of the deputy clerk was necessary; that in administering the oath, S. C. acted under the superintendence of the Court; and that the oath was as obligatory as if it had been administered by one of the judges.

The State v. Miller.

THE STATE v. MILLER.

GRAND JURY—QUALIFICATIONS AS TO AGE.—The circumstances that some of the grand jurors who had found an indictment, were above sixty years of age, is no objection to the indictment.

SAME.—The statute of 1824 excuses persons above sixty years of age from serving on juries, if they choose to claim the privilege; but the party indicted can not object to them on that ground.

ERROR to the Floyd Circuit Court.

BLACKFORD, J.—Indictment for an assault. Plea in abatement, that two of the grand jurors who found the bill were above 60 years of age. Demurrer to the plea, and judgment for the defendant.

This plea is founded upon the statute of 1824. R. C. 1824, p. 234. That statute requires the county commissioners to select persons as jurors, who are between the ages of 21 and 60 years. It is very similar to the statute of Westminster 2, ch. 38, which expressly provides, that old men above the age of 70 years shall not be put on juries. According to the construction given to the statute of Westminster, such old men if returned may be discharged upon their claiming the privilege, but the party has no right to challenge them. 3 Bac. 759. So, with respect to our statute, men above 60 years are excused from serving on juries, if they choose to claim the privilege, but the party has no right to object either by challenge or otherwise, because any such men happen to be upon the jury (1).

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the joinder in demurrer are set aside, with costs. Cause remanded, &c.

Whitcomb, for the state.

Farnham, for the defendant.

(1) The act of 1831 says, that nothing therein shall be so construed as to prevent persons over the age of 60 years from serving as grand or petit jurors. R. C. 1831, p. 292.

[*37]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1827, IN THE ELEVENTH YEAR OF
THE STATE.

HARRINGTON *v.* WITHEROW, in Error.

PLEADING—DILIGENCE—FACTS (*a*).

A. ASSIGNED to B. a note against C. in payment of a judgment which B. had obtained against A.; and it was agreed, that if the money could not be obtained by due course of law from C., A. would pay to B. the amount due on the judgment. *Held*, that in a suit by B. against A., after failure to recover the money from C., an averment in the declaration that the plaintiff had, without delay, prosecuted C. to insolvency without obtaining the money insufficient; that due diligence, in the prosecution of a suit, is a matter of law arising out of the facts of the case, which facts must be set out that the Court may determine whether they show due diligence or not; that the time when and the place where suit was instituted, the

(*a*) See 17 Ind. 545-549; 48 *Id.* 106; 13 *Id.* 357; 10 *Id.* 451.

Reno and Another v. Hollowell.

time judgment was obtained, the nature of the execution, the time it issued, and the sheriff's return, should be set forth (1). *Held*, also, that if the sum to which the plaintiff was entitled depended on the amount due on the judgment, the Court could assess the damages, after judgment for the plaintiff on demurrer, without a jury; and so wherever there are records or other undisputed documents to determine the amount due (2).

[*38] * (1) Vide *Hanna v. Pegg*, Vol. I. of these Rep. 181, 183. In an action of false imprisonment, the defendant attempted to justify the arrest on a suspicion of forgery, and stated in his plea that the plaintiff was *suspiciously* possessed of a note and disposed of it in a *suspicious manner*, and in a *suspicious manner* left England and went to Scotland. *Held*, that the plea was too general; that the causes of suspicion ought to have been set forth in certainty. *Mure v. Kage*, 4 Taunt. 34. Vide 1 Chitt. Pl. 217, 241; Gould, 53; *Harrod v. Barretto*, 1 Hall, 155, 164; *Starbuck v. Murray*, 5 Wend. 148, 159.

(2) Vide *Tannehill v. Thomas*, Vol. I. of these Rep. 144, and note. R. C. 1831, p. 408.

 RENO and ANOTHER v. HOLLOWELL.

PLEADING—DUPLICITY.—Covenant on an obligation for the payment of money. Plea of payment and a release; which release the plaintiff had since destroyed. Replication, that the plaintiff had not destroyed the release. *Held*, that the plaintiff, not having specially demurred to the plea for duplicity, as he might have done, was bound to answer all its parts; and that the replication, therefore, not denying the payment, was insufficient (a).

ERROR to the Jackson Circuit Court.

SCOTT, J.—Hollowell declared against Reno and Moore in covenant on an obligation for a sum of money. The defendants pleaded that they had, before the commencement of the suit, paid to the plaintiff the full amount of the said writing obligatory, together with all interest, which the plaintiff accepted in full satisfaction; and that

(a) See 12 Ind. 174.

Harper v. Ragan, Agent, &c.

the plaintiff executed and delivered to them a release of the said writing or covenant, which release he, afterwards, forcibly wrested out of their hands and possession and tore it in pieces. The plaintiff replied, that he did not forcibly wrest and tear in pieces the said supposed release, as said defendants had alleged. There was a demurrer to this replication, joinder, and judgment for the plaintiff.

This plea sets up two distinct matters of defence, payment, and a release, either of which alone, if well pleaded, would be a sufficient bar to the action. The plaintiff might have objected to it, by special demurrer, for duplicity; but not having done so, he was bound to answer all its parts. 5 Bac. Abr. 444, 5; 1 Chitt. 513; 1 Vent. 272 (1).

This replication does not deny the payment, which is material. It is, therefore, substantially defective, and the demurrer ought to have been sustained.

[*39] **Per Curiam*.—The judgment is reversed, and the proceedings subsequent to the plea are set aside with costs. Cause remanded, &c.

Braman, for the plaintiffs.

Nelson, for the defendant.

(1) If, instead of demurring for duplicity, the opposite party passes the fault by and pleads over, he is, in that case, bound to answer each matter alleged; and has no right, on the ground of the duplicity, to confine himself to any single part of the adverse statement. Steph. on Pl. 295.

HARPER v. RAGAN, Agent, &c.

AGENT—RIGHT OF ACTION BY—WHEN.—The defendant had signed a subscription paper, promising to pay a certain sum of money towards defraying the expenses of erecting the public buildings at Connersville, provided a new county should be established, and Connersville be made the seat of justice—the money to be paid into the hands of any person whom the board of commissioners of the new county should authorize to receive

Harper v. Ragan, Agent, &c.

it. *Held*, that the county agent, having no legal or beneficial interest in the contract, could not sue upon it in his own name (a).

SAME.—If the agent had been specially appointed by the commissioners to receive the money, which was to be paid to any person thus appointed, that circumstance would not have authorized a suit in his own name.

Seem, that if one person promise another for the benefit of a third, the third person may sue.

ERROR to the Fayette Circuit Court.

BLACKFORD, J.—Ragan, as agent of the county of Fayette, brought an action of debt against Harper, upon a subscription paper, in which the defendant promised in writing to pay 75 dollars towards defraying the expenses of erecting the public buildings at Connersville, provided a new county should be established, and Connersville be made the seat of justice: the money to be paid into the hands of any person whom the board of commissioners of the new county should authorize to receive it. The declaration avers the establishment of the new county of Fayette, and of the seat of justice at Connersville; also, the appointment of the plaintiff, by the commissioners, agent for the county, and notice of the premises to the defendant. General demurrer to the declaration, and judgment for the plaintiff below.

The only question, presented by the parties in [*40] this cause, for our consideration is, whether the agent of the county is the proper person to sue on this instrument of writing. There is nothing in the statute authorizing the appointment of a county agent, which gives him specially any authority to sue, in his own name, for a debt of this kind due to the county. The right, therefore, of Ragan, as agent of the county, to sue in his own name in this case, depends upon general principles; and to determine it correctly, we must ascertain whether he has such an interest in the contract, as justifies the suit. His being general agent of the county merely, will not do. Agents and attorneys, authorized to collect debts

(a) 3 Blkf. 339; 5 *Id.* 69; 6 *Id.* 317; 3 Ind. 373, 508.

Harper v. Ragan, Agent, &c.

due to others, have not the interest of the contract, and can not sue in their own names, but only in the names of their principals. *Jones v. Hart's Executors*, 1 Hen. & Munf. 471; *Gunn v. Cantine*, 10 Johns. Rep. 387.

Supposing him to have been specially appointed by the commissioners to receive this money, which was to be paid to any person thus appointed, that circumstance, it is conceived, would not authorize this suit. In that case, Ragan would be considered only as the medium through which the money was to be paid to the county, not as the person beneficially interested. To this, the case of *Piggott v. Thompson*, 3 Bos. & Pull. 147, may be cited. There certain persons were appointed, by act of parliament, commissioners for draining lands, and were empowered to erect toll gates. They let the tolls to a person who signed this instrument of writing: "June 23rd, 1798. Now to be let the several tolls of Burnt Fen first district, with the toll house. June 23rd, 1798—I do hereby acknowledge to have hired the above tolls for three years by private contract, at one hundred and forty-five pounds per annum, to be paid to the treasurer of the commissioners at his house in Ely, by twelve equal monthly payments in each year: the first payment to begin and be made on the 24th day of July next." The treasurer, upon this contract, brought suit. At the date of the contract, and at the time of the trial, he was treasurer to the commissioners, appointed under the act of parliament, with an annual salary. The Court held, that the action would not lie in the name of the treasurer; and that the commissioners alone could sue; that the contract was with them, to pay to their treasurer, not for his, but for their benefit.

[*41] The same doctrine has been heretofore recognized by this Court. A board of commissioners sued a county collector for not paying over the taxes collected. It was objected, that as it was the duty of the collector to pay the taxes to the county treasurer, the treasurer

Harper v. Ragan, Agent, &c.

not the commissioner, should have sued. The Court held the action to be rightly brought. The money being due the county, the commissioners, by the express words of the statute, were the proper persons to sue. *Board of Commissioners of Gibson County v. Harrington*, November term, 1823 (1).

In the case now before the Court, the defendant promised to pay a certain sum, into the hands of any person whom the commissioners should appoint to receive it, towards defraying the expenses of erecting the public buildings, upon certain conditions, the performance of which is averred. We can not perceive how the legal or beneficial interest of this promise can be supposed to exist in the county agent. It is not the case of one person promising another for the benefit of a third: there perhaps the third person may sue, though the cases are not uniform as to that; nor does it come within the exceptions to the general rule like some cases of factors, brokers, &c. No consideration passed from the plaintiff, no promise was made to him, nor to another for his benefit. It is merely the case of a conditional promise to pay to the county, through the medium of some person to be authorized to receive it, a certain sum of money, not for the benefit of that person, but for the exclusive benefit of the county.

The Court is therefore of opinion, that this is a contract, if valid, in which the county agent has no interest, legal or beneficial, which, upon general principles, can enable him to sue in his own name; and as he is not specially authorized by the statute thus to sue in such cases, it follows that this action, in the name of the agent can not be supported.

Per Curiam.—The judgment is reversed with costs.

Wick, for the plaintiff.

Smith, for the defendant.

(1) Vol. 1 of these Rep. 260.

[*42] *HARRINGTON and Another v. FERGUSON.

BASTARDY—EXECUTION—PRACTICE.—An order by the Court of filiation and bastardy, may be enforced by scire facias or debt on the order against the putative father, or on the recognizance against those who have entered into it, in the name of the state, on the relation of the party entitled (a).

SAME—DESCRIPTION OF WRIT.—The scire facias or declaration, in such case, must describe the cause of action of the party claiming, show by what authority he has had the care of the child, and why he is entitled to the benefit of the order for maintenance (b).

APPEAL from the Gibson Circuit Court.

BLACKFORD, J.—This was a motion by Ferguson, in the Circuit Court, for judgment against Charles & William Harrington. There was no process nor pleadings; and of course, there is no description on the record, by the plaintiff, of his cause of action. It appears, by a bill of exceptions, that Ferguson produced an order of the same Court of September term, 1818, against Charles Harrington, to the following effect: That he was the father of a bastard child; that he should pay the mother 30 dollars in 30 days, and pay annually for the six succeeding years, 20 dollars, as the Court should direct, for the maintenance of the child, and enter into recognizance, with surety, for the performance of the order. It appears further, that a recognizance was entered into by William Harrington. The Circuit Court, upon this motion, with this order before them, gave judgment against Charles Harrington, putative father, and William Harrington, the recognizor, for 120 dollars, the amount of the annual payments mentioned in the order.

The mode of proceeding in cases of bastardy, until the order by the Court of filiation and bastardy, is stated in *Woodkirk v. Williams*, Nov. term, 1820 (1). This case presents the question, as to the mode of enforcing the order. That may be done by scire facias or debt, upon

(a) 4 Blkf. 316; 7 Blkf. 558. (b) 5 Blkf. 166.

Harvey v. Crawford and Others.

the order, against the putative father, or upon the recognition against those who have entered into it, in the name of the state, on the relation of the party entitled. The scire facias, or declaration, must describe the cause of action of the party claiming, show by what authority he has had the care of the child, and why he is entitled to the benefit of the order for maintenance. An opportunity is thus given to *the defendants to make their defence, if they have any, and the cause proceeds in the ordinary mode. That an action of debt lies on such an order, made by justices of the peace, and that the order is conclusive against the defendants, whilst unreversed, is decided in *Wallsworth v. Mead, et al.*, 9 Johns. R. 367.

Per Curiam.—The judgment is reversed with costs.

Hall, for the appellants.

Hawk, for the appellee.

(1) Vol. 1 of these Rep. 110.

HARVEY v. CRAWFORD and Others.

USURY—RELIEF—EQUITY PRACTICE.—The payee of a note, who has sued the makers, can not demur to a bill in Chancery, filed by the latter, because it charges the note to be usurious and prays a discovery, if the complainants have brought the principal and legal interest into Court.

INTEREST—CALCULATION.—If a new contract be made respecting money previously lent and a new security be given, the interest should be calculated up to the time of the new contract and added to the principal; but this calculation is not to be made at every agreement for forbearance of payment, where no change is made in the securities.

SAME—PRINCIPAL—APPLICATION OF PAYMENT.—Whenever a sufficient payment is made, the interest must be first discharged; but if the payment be less than the interest, the balance of the interest does not become principal (a).

COSTS—ADJUDICATION OF.—The bill in the above-named cause having been taken for confessed and a decree rendered enjoining the payee's pro-

(a) See 3 Blkf. 18, 347; 16 Ind. 147; 28 *Id.* 488; 57 *Id.* 248.

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ceedings at law, *held*, that costs might be given to complainants. *Held*, also, that the decree should secure to the payee his costs in the suit at law.

ERROR to the Wayne Circuit Court.

HOLMAN, J.—Harvey brought an action of debt against Crawford and others on a promissory note. The defendants filed a bill in chancery, charging that the note was given on an usurious contract; bringing into Court the money said to be due for principal and interest; and praying a discovery of the usury, an injunction of the proceedings at law, and relief. To this bill Harvey demurred. The principal causes of demurrer were, first, that the disclosure of usury, if any, would subject him to a criminal prosecution; and, secondly, that all the money due is not brought into Court. The first of these causes

is removed by the bringing of the principal and interest into Court. The only penalty for usury, by the act [*44] of assembly, that was in force *at that time is the forfeiture of the interest. Stat. 1818, p. 87 (1). If the defendant can not answer without confessing usury, he may take the money out of Court, and thereby receive all to which he is equitably entitled; and by failing to answer will subject himself to no forfeiture. If he can deny the charge of usury, he is at liberty to do so. So that in either case he is subjected to nothing but the loss of an illegal advantage. On the second ground of demurrer, we discover that the complainants and the defendant have adopted different modes of calculating interest. The true method of calculation we conceive to be this: that wherever a new contract is made about the money loaned, and a new note, or new security given, the interest should be calculated up to the time of such new contract, and added to the principal. But that this calculation is not to be made at every agreement for further forbearance of payment, if no change is made in the securities. And that whenever a payment is made, the interest must be dis-

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charged first; but if a sum less than the interest is paid, the balance of the interest does not thereby become principal (2). Adopting this mode of calculation, we perceive that the sum paid into Court, on the most exact calculation, will cover all the principal and interest really due, except about two dollars; a sum too small, in a long and often varied contract for several hundred dollars, to authorize the reversal of a decree.

When the demurrer in this case was overruled, the defendant refused to answer; the bill was taken for confessed; and the Circuit Court decreed a perpetual injunction of the proceedings at law, and gave the complainants a decree for costs. As this was a matter originally cognizable in a Court of chancery, and was not taken into a Court of law by the complainants, there was nothing in it to prevent the Court of chancery from granting the necessary relief. Costs in chancery are generally a matter of discretion; and we do not discover but that the whole circumstances of this case may warrant the decree for costs.

One thing however remains. Harvey had proceeded at law to recover a sum of money for which he had a legal demand. The principles of equity would not interfere to stay his further proceedings until the sum really due was paid into Court. The costs at law were therefore a matter of right; and nothing has transpired in the proceedings in chancery to show that he was [*45] *not equitably entitled to them; for the same rule that requires the complainants to do equity, by bringing the principal and legal interest into Court, would require them to pay the costs that had already accrued in attempting to recover the money thus admitted to be due.

Per Curiam.—The decree, except so much thereof as perpetually enjoins the recovery of the costs at law, is affirmed. That part of the decree, which enjoins the re-

Capp v. Gilman.

covery of those costs, is reversed. Cause remanded, &c.

Rariden, for the plaintiff.

Smith, for the defendants.

(1) R. C. 1824, pp. 227, 228, accord. In 1831 this law was changed, and the parties were authorized to make a written agreement for the payment of interest at any rate they pleased. In the absence of any such agreement, 6 *per cent. per ann.* was the legal rate. R. C. 1831, p. 290. In 1833 the law was again changed. The legal rate of interest, if there be no written agreement on the subject, is now 6 *per cent. per ann.* The parties may agree in writing for a higher rate, not exceeding 10 *per cent. per ann.* The penalty, on conviction by presentment or indictment, for receiving more than 10 *per cent. per ann.* is a fine to the state, for the use of the county seminary, in double the amount of the excess of interest above 10 *per cent. per ann.* so received. Stat 1833, p. 43.

(2) Accord, *Dean v. Williams*, 17 Mass. 417; *Wasson v. Gould*, May term, 1832, post.

CAPP v. GILMAN.

JUDGMENT—PLEADING.—In an action on a judgment, profert of the record is unnecessary; the *prout patet per recordum* is sufficient even on special demurrer.

PRACTICE—OYER—RECORD.—Oyer of a record is never granted (*a*).

PLEADING—REAL PARTY PLAINTIFF.—If the plaintiff name himself as administrator, in a suit on a judgment recovered in his own name on promises made to himself, no profert of the letters of administration is necessary; the word administrator may be considered as surplusage, or as a descriptio personæ (*b*).

PLEADING—ASSUMPSIT.—The declaration, in such case, may be in the debt and detinet.

SAME—FOREIGN JUDGMENT.—If the county and circuit, in which an action on the judgment of a Court in another state is brought, be named in the margin of the declaration, no objection can be made for want of a venue (*c*).

ERROR to the Franklin Circuit Court.—This was an action of debt. The declaration, so far as respects the points noticed by the Court, is as follows: Frank-
[*46] lin Circuit, Franklin county, *viz. Benjamin I. Gilman, deceased, complains of Jacob G. Capp. &c.,

(*a*) See post 82; 5 Blkf. 360. (*b*) See 9 Ind. 260. (*c*) See 4 Blkf. 179.

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of a plea that he rendered unto him the sum of 686 dollars, which to him he owes and from him unjustly detains. For that whereas the said plaintiff heretofore, to-wit, at the term of August, 1824, in the Court of Common Pleas of Hamilton county and state of Ohio, by the judgment of said Court, recovered against the said Jacob G. Capp the sum of, &c., which was adjudged to the said plaintiff, in the said Court, for his damages which he has sustained, as well by reason of the not performing certain promises and undertakings to the said plaintiff by the said defendant then lately made, as for his costs, &c., whereof the said Jacob G. Capp is convicted, as by the record and proceedings thereof now remaining in the said Court of Common Pleas of Hamilton county, state of Ohio, more fully appears, &c.; which said judgment still remains in full force, &c. Whereby an action, &c. Yet, &c. To the damage, &c. To this declaration the defendant specially demurred. The causes of demurrer are, 1st, there is no profert of the record on which the action is founded; 2dly, there is no profert of the letters of administration; 3dly, the cause of action is not within the jurisdiction of the Court; 4thly, the suit is in the debet and detinet.

Judgment on the demurrer for the plaintiff as administrator as aforesaid.

HOLMAN, J.—The action was brought by Gilman in the Franklin Circuit Court, on a judgment obtained in the Court of Common Pleas of Hamilton county, state of Ohio. The declaration states the recovery of the judgment, *as by the record thereof, now remaining in the said Court of Common Pleas, more fully appears.* This is sufficient even on special demurrer. Oyer of a record is never granted. *Rex v. Amery*, 1 T. R. 149 (1). The second and fourth causes of demurrer are removed by a slight view of the whole declaration. The plaintiff names

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himself as administrator unnecessarily. He sues on a judgment recovered in his own name, on promises made to himself. The word *administrator* may therefore be considered as surplusage, or as a *descriptio personæ*. The same answer may be given to the objection, the judgment is rendered for the plaintiff as administrator (2).

The only point on which we have hesitated, is [*47] the third *cause of demurrer; the want of a venue. The necessity of a venue is to give jurisdiction, and to show from whence the jury are to come. Here the declaration contains "*Franklin county and circuit*," as a marginal venue, and proceeds to show that the defendant was indebted to the plaintiff, by virtue of a judgment of a Court of record in the state of Ohio. By virtue of this judgment, the defendant became indebted to the plaintiff, and might be sued in any place where he could be found. Franklin Circuit Court therefore had jurisdiction of the case; as it must be intended that, if he was found in the Franklin Circuit, he was there indebted to the plaintiff. This is rendered as certain as if the marginal venue was repeated, or a reference made to it, in the body of the declaration. The Court in which the judgment was obtained is properly set out, and to have added under a *videlicet* that it was obtained in the Franklin Circuit was unnecessary, as the record is not tried by a jury but by the Court. We are therefore of opinion that the venue in the margin is at any rate sufficient. See 1 Chitt. on Pl. 269, 281 (3).

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

Caswell, for the plaintiff.

(1) Vide *Harlow v. Beekle*, Vol. 1 of these Rep. 237.

(2) Vide *Savage v. Meriam*, Vol. 1 of these Rep. 176 and note: *Helm v. VanVleet*, Ibid. 342.

(3) The county in the margin of the declaration held a sufficient venue, on special demurrer. *Duncan v. Passenger*, 8 Bing. 355.

Mills and Another, Administrators, v. Cuykendall, Administrator.

MILLS and Another, Administrators, v. KUYKENDALL, Administrator.

BILL OF EXCHANGE—PAYABLE OUT OF CERTAIN FUNDS.—A bill drawn on an administrator in these words, "Please to settle 80 dollars out of my part of the estate, with Nathan Harness, and this my order shall be your receipt for the same,"—is not a valid bill of exchange; being payable only out of a particular fund.

SAME—PLEADING.—A declaration against the acceptor of such a bill, depending alone for its support upon the bill and acceptance, contains no cause of action, whether the acceptance be absolute or conditional.

[*48] **ADMINISTRATOR—PROMISE OF—LIABILITY OF ESTATE.**—*The administrator, on whom the above-named bill was drawn, promised the holder if he would retain the bill, it should be paid whenever a certain farm should be sold; *Held*, that as the consideration of this promise arose subsequently to the intestate's death, no action would lie against the administrator on the promise, so as to charge the estate of the intestate.

SAME—PLEADING—STATUTE OF FRAUDS.—The promise of an administrator, to pay a debt of the intestate, need not be averred in the declaration to be in writing; the statute of frauds applying to the proof and not to the declaration (*a*).

APPEAL from the Knox Circuit Court.

BLACKFORD, J.—This was an action of assumpsit by Kuykendall, administrator of Nathan Harness, against Mills and Harness, administrators of Adam Harness. The declaration contains two counts. In the first count, the plaintiff avers that Michael Harness, one of the heirs of Adam Harness, deceased, being entitled to 100 dollars from the defendants, administrators of the estate, drew an order in writing for 80 dollars in favor of Nathan Harness, for value received from him, directed to the defendants, administrators, as follows: "Please to settle 80 dollars out of my part of the estate, with Nathan Harness, and this my order shall be your receipt for the same." The plaintiff further avers that his intestate, Nathan Harness, presented this order to the defendants, administra-

(*a*) See 8 Blkf. 105-108; 3 Ind. 213; 6 *Id.* 53; 21 *Id.* 433; 8 Blkf. 24; 4 Ind. 488; 27 *Id.* 277; 45 *Id.* 576.

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tors; and that they accepted the same by parol. By means whereof they became liable, &c., and promised to pay, &c. The second count is the same with the first, except that it alleges—that the defendants, administrators, refused to accept the order, and requested the payee to keep it, promising to pay it if they should sell a certain farm belonging to the estate; that the payee did keep the order; and that the defendants had sold the farm. By means whereof the administrators, &c., became liable, &c., and in consideration thereof, promised, &c. To the declaration, there is the common conclusion that the defendants, though often requested, &c., have not paid, &c. The defendants pleaded non assumpserunt, and the plaintiff joined issue. The cause was tried, and the jury found for the plaintiff below 80 dollars in damages. The defendants moved for a new trial, which was overruled; and the Court rendered judgment on the verdict against the defendants below, *de bonis propriis*.

The refusal of the Court to grant a new trial in this case is one of the errors assigned. That point must be laid out of the case. The grounds of the motion [*49] for a new trial are not *before us, and we have no means of determining as to the propriety of the decision. Copies of an affidavit of the discovery of new evidence, and of a dedimus and deposition, are sent up by the clerk, but none of these papers are made matter of record, by bill of exceptions or otherwise; and we are therefore obliged to pass them by without notice. Nothing appearing to the contrary on the record, we are bound to presume that the motion for a new trial was correctly overruled.

This cause turns altogether upon the question, whether the declaration contains a sufficient cause of action?

The first count, in substance, is upon the absolute acceptance of a bill of exchange. The writing accepted is set out in *hæc verba* in the declaration. It is a draft by an heir upon the administrators to pay a certain sum *out*

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of his part of the estate. The bill is not drawn upon the general credit of the drawer, but is only a request to pay *out of a particular fund.* It is not therefore a bill of exchange. To this there are many authorities. Thus, a bill as follows, "Sir, you are to pay Mr. Herle £1,945 out of the money in your hands, belonging to the proprietors of the Devonshire Mines, being part of the consideration-money for the purchase of the manor of West Buckland," was held to be no bill of exchange, because it was only payable out of a particular fund. *Jenny v. Herle*, Ld. Raym. 1361. See also, *Dawkes v. Lord de Loraine*, 2 Bl. Rep. 782; 3 Wils. 207; Chitt. on Bills, 56. The first count therefore is bad. It depends alone for support upon the acceptance of an instrument of writing, which of itself contains no cause of action.

With respect to the second count. In that is set out a conditional acceptance of the same bill that is described in the first count. The averment is, that the administrators refused to accept the writing, but requested the payee to keep it, and promised that if they should sell a certain farm of the estate, they would pay the money in the writing mentioned; that the payee accordingly did keep the order, and that the administrators have sold the farm. This allegation, so far as the validity of the declaration depends upon the instrument of writing as a bill of exchange, can not have a greater effect than the absolute acceptance of the bill averred in the first count. By the terms of the bill, the payment depends upon the sufficiency of a particular fund, and it is therefore, as [*50] has been already *observed, of no validity. Its acceptance, whether absolute or conditional, can not be declared on as a cause of action. To the second count, so far as it is founded on the bill, the following passage from Chitty on Bills is applicable: "When a bill has been drawn on an agent requesting him to pay a sum of money out of a particular fund, though we have seen that such an instrument will be wholly void as a bill of

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exchange, because the payment of it depends upon a contingency; yet if the drawee promises to pay the amount when he shall receive funds, and the holder in consequence retains the bill, the amount, when received will be recoverable from the drawee under the common count for money had and received." He cites this case: In assumpsit, the first count was against the defendant as the acceptor of a bill of exchange, drawn by Admiral Smith on the defendant his agent; the others were the money counts. The defendant was a navy-agent, and the bill was as follows: Out of my half-pay, which will become due on the 1st of January, pay to Stephens £15. This was brought to the defendant, who said he had then no money of Admiral Smith's in his hands, but that he would pay it out of the admiral's money when he received it. The defendant objected to the count on the bill as it appeared to be not a bill of exchange, it being drawn on a particular fund, and not payable generally, which was necessary to constitute a legal bill of exchange. This count was abandoned by the Solicitor-General, who put the case on the count for money had and received; and on that count had judgment. Chitt. on Bills, 252. The second count therefore in this declaration, so far as it is founded on the bill, is equally objectionable with the first count.

If the second count be considered as depending for its support, not on the bill and its conditional acceptance, but upon the promise stated to have been made by the defendants to pay Nathan Harness the debt due to him from Michael, in consideration of the keeping of the bill by Nathan at the defendant's request, until the farm should be sold—we think that ground will not support the count. There, the consideration of the promise arises subsequently to the intestate's death, and therefore if sufficient to support the promise, it can only charge the defendants personally, and can only support an action

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against them in their individual capacities (1).
[*51] This is not such an action. It *is against the defendants as administrators. They are not merely named in such a way, that the term administrators may be considered a *descriptio personarum*. On the contrary, the defendants are charged throughout in their representative characters. The whole case shows, that the object of the plaintiff was to charge the estate of the deceased, by obtaining a judgment against the administrators *de bonis intestati*. The promise of administrators, on a consideration originating subsequently to their intestate's death, can not sustain such an action. Whether the consideration, averred in the second count, will support the promise to charge the defendants personally, we give no opinion: the case does not require it. That the promise is not stated to be in writing would be no objection, were the case calculated for a judgment *de bonis propriis*, as the statute of frauds applies to the evidence, not to the declaration (2); but the fatal objection to the count is, that the plaintiff in his suit goes altogether against the administrators in their representative character—against the estate of the intestate, when, by his own showing, that estate has nothing to do with his cause of action, and can in no way be affected by it.

Per Curiam.—The judgment is reversed with costs.

Tabbs, for the appellants.

Judah, for the appellee.

(1) *Forth v. Stanton*, 1 Will. Saund. 210 and note (1).

(2) Note (2) to *Forth v. Stanton*, 1 Will. Saund. 211. Where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act, as in the case of a will of lands, to have been made in writing; but where an act makes writing necessary to a matter, where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the statute of frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence. Anon. 2 Salk. 519. Note (2) to *Duppa v. Mayo*, 1 Will. Saund. 276. In an action on a bill of exchange, the declaration averred that the defendant had accepted the bill, but did not aver the acceptance to be *in writing*. *Held*, that the averment was sufficient on a special demurrer, although the statute of 1 and 2 Geo. 4 requires the acceptance to be *in writing*. *Chalie v. Belshaw*, 6 Bing. 529.

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[*52] *EATON, Associate Judge, &c., v. BENEFIELD and Another.

ADMINISTRATORS—SURETIES—REMEDY OF CREDITORS.—The statute requiring executors and administrators to give bond with surety, imposes on them no new duties; but it gives an additional remedy to creditors, legatees, and persons entitled to distribution.

SAME.—A creditor can not sue on an administration-bond, until after he has obtained judgment against the estate of the intestate.

SAME.—A legatee, distributee, or creditor, until his claim has been exhibited and established according to law, and the payment thereof has been refused by the executor or administrator, is not a party injured within the meaning of the statute, and can have no suit for his benefit on the executor's or administrator's bond (a).

SAME—PLEADING—RELATOR.—The declaration on a bond of an executor or administrator, must show the relator to be a creditor, legatee, or distributee.

APPEAL from the Sullivan Circuit Court.

SCOTT, J.—To an action of debt on an administration-bond, the defendants pleaded plene administravit; to which plea the plaintiff demurred; and there was a judgment for the defendants.

The action is brought in the name of John H. Eaton, associate judge of Sullivan county, on the relation of Jesse Hadden and Henry Harper. We are not informed by the record, who these relators are, or in what capacity they come before the Court; whether as legatees, as persons entitled to distribution, or as creditors of the deceased; or whether they have any interest at all in the estate. It was decided by this Court, in the case of *Songer v. The Associate Judges of Dearborn*, at the May term, 1823, that in such an action as the present, it must appear that there was a relator who had a beneficial interest in the suit (1). It was not decided, nor was it necessary to decide, in that case, what steps were requisite, prior to bringing suit on the bond, to show the relator to be beneficially interested. Although the administrator may have

(a) See 1 Ind. 105, 538; 31 *Id.* 444; 15 *Id.* 104.

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violated the condition of his bond, and thereby laid himself and his sureties liable to the party injured, yet he is not liable to all the world; nor is he liable even to creditors or legatees, until they have sustained injury by his misconduct or negligence. In England, no bond is required of an executor; and the statute, 22 and 23 of Car. 2, which requires administrators to give bond and security, imposes no new duty on the administrator.

[*53] Neither does the *statute of this state. The duty of executors and administrators, both here and in England, remains just as it was before; but creditors, legatees, and persons entitled to distribution, have an additional remedy for its performance. The statute requiring bond was made for the benefit of creditors, legatees, and distributees of the deceased; but it would be unreasonable and unjust, that they should be permitted to avail themselves of that remedy against an innocent surety, before they have shown the nature and amount of their claims, that assets to a certain amount came to the hands of the administrator, and that he has misapplied or wasted them.

The form of an administration-bond in England is the same as that required by our statute; yet no one ever thought of claiming a judgment against an administrator *de bonis propriis*, in that country, before he had obtained a judgment against the estate of the deceased. After judgment obtained against the administrator *de bonis intestati*, there were various methods of proceeding to obtain judgment against him *de bonis propriis*, which we need not now examine. All that is necessary at present is to show that no judgment could be had, by a creditor, against an administrator *de bonis propriis*, in England, until the plaintiff had first established his claim against the estate of the intestate in a due course of law. Sergeant Williams has given a copious and satisfactory view of this subject, in a note on the case of *Wheatly v. Lane*, 1 Saund. 219, n. 8.

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The administration-bond is joint and several. If the obligors are liable to a joint action, they are liable also to be sued severally; and the judgment against them whether joint or several is *de bonis propriis*. Thus not only would the administrator be liable to an action and judgment against his own goods, where no judgment had been obtained, and where possibly none ever could be obtained, against the estate of the intestate; but an innocent surety also might be dragged into Court in a several action against himself, founded on an alleged claim against the deceased, of the merits of which he could not be supposed to be cognizant, and against which he possessed no means of defence. *Greenside v. Benson*, 3 Atk. 248; *Braxton v. The Justices of Spotsylvania*, 1 Wash. R. 31; *Gordon's administrators v. The Justices of Frederick*, 1 Munf. R. 1; *Catlett et al. v. Carter's executors*, 2 Munf. R.

[*54] 24. In our statute, *the general assembly seems to have had an eye to the same course of proceeding. R. C. 1824, p. 323.

The same rule applies to legatees and distributees; although they may not in all instances have to take the same steps, yet they must present their claims in such a way as to make it the duty of the administrator or executor to pay. They must occupy such ground that, in refusing or neglecting to discharge their claims, he so far violates his duty as to subject himself, independently of the bond, to a judgment *de bonis propriis*. R. C. 1824, p. 321, sec. 18.

Any person, whether legatee, distributee, or creditor, whose claim has not been exhibited and established according to law, and refused by the administrator, is not a party injured within the meaning of the statute, and has no right to the possession of the bond, nor to have a suit brought upon it at his instance and for his benefit; and where the right of suing on the bond is abused, it is the duty of the Court to interfere and stop the proceedings. 1 Johns. Rep. 311. It is not shown nor even alleged that

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the relators, in this case, are either creditors or persons entitled to distribution. For aught that appears in the declaration, the action would have been as well brought on the relation of John Doe and Richard Roe.

It is unnecessary to examine the plea. The demurrer brings the whole case before the Court. The declaration is defective, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

Judah, for the appellant.

Tabbs, for the appellees.

(1) Vol. 1 of these Rep. 251. When suit is brought on a bond given by an executor or administrator, or by any state, county, or township officer, to the state, governor, judges, sheriff, or other civil officer, for the performance of any duty or trust, the person for whose use the suit is instituted, must endorse on the process for whose benefit the same was issued; and, if he fail in the suit, he is liable for costs. R. C. 1831, pp. 402, 403.

In actions of ejectment, actions in the name of the state for the use of any person, actions in favor of a nominal plaintiff for the use of another person, the defendant, if he obtain judgment, may, in lieu of the order and attachment for costs heretofore allowed, take a judgment for costs against the lessor relator, or person for whose use the suit is brought. Stat. 1833, p. 113.

[*55] *M'DONALD and Another v. BEACH and Another.

PARTNERSHIP—EQUITIES OF FIRM AND INDIVIDUAL CREDITORS.—The doctrine—that the separate debt of one partner should not be paid out of the partnership estate, until all the debts of the firm are discharged—is correct; but it does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only, when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors (a).

SAME—FRAUDULENT CONVEYANCE.—Those equitable principles operate on the property remaining in the possession of the partners, and embrace all that has been fraudulently disposed of; but they do not extend to such as has been previously transferred by the firm in good faith.

ERROR to the Clark Circuit Court.

(a) See 4 Ind. 169, 9 *Id.* 343; 17 *Id.* 463; 15 *Id.* 124; 33 *Id.* 114.

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HOLMAN, J.—The bill, answers, and exhibits, in this case, show that William Steele and Robert Steele, merchants and partners, were indebted to the complainants in the sum of 4,043 dollars, for which they drew a bill of exchange on Richard Steele, a resident of Louisville, Kentucky, payable on the 15th of December, 1822, which was presented and accepted, as is said, for the accommodation of the drawers, but was afterwards protested for non-payment; and that William and Robert Steele are insolvent. The bill also charges a further debt against William and Robert Steele of several thousand dollars, but of this there is no proof. It also appears that William Steele, as surety for John Wilson (who was insolvent), was indebted by a writing obligatory to the trustees of Clarksville to the amount of 2,700 dollars; and that Orlando Raymond, as agent for the trustees, obtained, through William Steele, from Richard Steele, who was the agent of William and Robert Steele, an order in the name of said firm, dated, the 14th of October, 1822, for 280 barrels of salt, the property of said firm, which had been shipped to Daniel Wurts, commission merchant of said firm at Jeffersonville, for sale. This salt was obtained on said order and deposited with the defendant Beach; and the proceeds were to go towards the payment of the debt due to the trustees. Raymond also obtained a draft, in the name of William and Robert Steele, on said Wurts for the balance of the debt due the trustees, dated the 26th of October, 1822, payable in six months; which draft was accepted by Wurts, provided

he should have funds belonging to the said Steeles, [*56] and he promised to retain the *funds that came into his hands for that purpose. In consequence of which draft, Wurts retained in his hands the sum of 1,200 dollars, which was less than the amount due the trustees. This draft was in the hand-writing of William Steele; but it does not appear that this fact was known either to Raymond or the trustees. On the 10th of No-

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vember, 1822, the trustees transferred the bond of Wilson and William Steele to Beach, who was one of the trustees; and, as a collateral security for the payment, they transferred to him their claim on the 280 barrels of salt, and also the draft on Wurts. The salt was afterwards sold for 1,012 dollars and 86 cents, and that amount credited on said bond, on the first of February, 1823.

The complainants claim the proceeds of this salt, and the money retained by Wurts, alleging that, by agreement with William and Robert Steele, they were to have the proceeds of all the salt shipped to Jeffersonville, and that this agreement was known to Beach and the trustees. The answers deny all knowledge of this agreement, and there is no evidence to support it. They also urge, that this disposition of the partnership property, to pay the separate debt of William Steele, was without the knowledge and consent of Robert Steele; and that the trustees knew this at the time they obtained the order and the draft aforesaid. This is denied by the answers; and there is no proof that this arrangement was made without the knowledge of Robert Steele. It is true that Robert Steele, who resided at Kenhawa, Virginia, wrote a letter to Wurts, dated the 8th of May, 1823, protesting against the payment of said draft, and stating that *he did not conceive it right for William Steele to apply the partnership property to the payment of his separate debt.* This letter was written after the proceeds of the salt had been credited on the bond of Wilson and William Steele, and after the draft on Wurts had become due and payable. It does not expressly deny a knowledge of, and consent to, the arrangement with the trustees; but if it is supposed to do this indirectly, its effect is somewhat weakened by the testimony of Raymond, who states that he saw Robert Steele in Louisville, in the month of October, 1822, or a little after; which was about the time, or just after, the trustees had obtained the 280 barrels of salt,

and the draft on Wurts; and it would seem from the deposition of Payne, a notary public, that, on the [*57] 18th of December, 1822, he *delivered to Robert Steele, in Louisville, a notice of the protest of the bill of exchange; so that it would appear that Robert Steele had an early opportunity of becoming acquainted with this arrangement with the trustees. It is further weakened by the fact that Richard Steele, the agent of William and Robert Steele, who gave the order for the salt, was personally bound to the complainants as acceptor of the bill of exchange, for the only debt they have proved against the firm of William and Robert Steele. Another strong ground which the trustees had to suppose that both the partners knew of the whole transaction, was, that when Raymond first applied to William Steele for the salt, said Steele informed him that he would do nothing in it without consulting his partner; and about three weeks afterwards he gave the order; and that William Steele, who resided at Cincinnati, Ohio, was, in general, the active partner in relation to the salt shipped by the firm to Jeffersonville. Taking these circumstances together, there seems to be strong reasons to induce a belief, that both the partners were acquainted with, and consented to the adjustment made with the trustees; and that both partners were bound by it. No argument is here drawn from the power that Richard Steele, as a general agent, had to adjust the separate debt of William Steele, by a disposition of the partnership funds; nor from the power that William Steele, as a partner, had to divert any part of the partnership property from the purposes of the firm, to pay his own debt, contrary to the will of his co-partner; for this power, in Richard Steele, as agent, or William Steele, as a partner, is not contended for. But where no covin appears, one partner will not be considered as acting without the consent of the other; and an agent as deeply interested as Richard Steele was, can never be presumed to transcend

his authority in behalf of strangers; when by so doing he will increase his own liability. There is a circumstance in this case that suggests the idea, that even the complainants considered this as a legal transaction. On the 9th of November, 1822, the complainants obtained an order on Wurts, in the name of William and Robert Steele, for the partnership funds that might be in his hands; which order was accepted by Wurts conditionally, to be discharged after satisfying his own demands, and the obligations he was already under on account of said firm. Now, it is not probable that the nature [*58] of this conditional *acceptance was unknown to the complainants, or was withheld from the knowledge of Robert Steele, unless the complainants, as well as Richard Steele, were perfectly satisfied with what had been previously done. So that we are induced to believe that no person whatever, at this period, supposed that there was anything illegal or fraudulent in this transaction with the trustees. And we are strengthened in the belief that this transaction was not only in good faith, but that no person supposed the contrary, from the circumstance that the adjustment was made, and the claim of the trustees transferred to Beach, sometime before we hear of any suspicion of the insolvency of William and Robert Steele. It is not until December, 1822, that we learn that they were considered doubtful at Kenhawa, the principal seat of their business; and not until March, 1823, that they were there reputed insolvent. Therefore, after examining all the circumstances of the case, we can but consider this transaction as the joint act of the firm, disposing of so much of the partnership property for the separate benefit of one of the partners.

But it is contended, that the separate debt of one partner should not be paid out of the partnership estate, until all the debts of the firm are discharged. This doctrine is correct, but it does not apply, until the partners cease to have a legal right to dispose of their property as they

please. It is applicable, only when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. These equitable principles operate not only on the property remaining in the possession of the partners, but embrace all that has been fraudulently disposed of; but will not extend to such as has been previously transferred in good faith. There is no ground on which we can presume that the trustees, when they made this arrangement for the discharge of their demand; or that Beach, when he purchased their claim; had any intention of defeating the claimants in the recovery of their debt; for it does not appear that they had any certain knowledge of its existence. They were desirous of recovering their own debt; and whether it was discharged out of the separate property of William Steele, or out of the partnership property of William and

Robert Steele, was a matter in which they were [*59] not directly concerned. The trustees obtained *possession of the salt, and of the draft on Wurts, and transferred their claim to Beach, at a time when no person, not even the complainants, seem to have supposed there was any unfairness in the transaction; and having obtained this legal advantage, it would require a strong claim, indeed, to divest them of it. The claim of the complainants is not of this nature. The only debt they have attempted to prove, arises on the bill of exchange. This was payable on the 15th of December, 1822. On the 9th of November previous, they received the conditional acceptance of their order on Wurts, and we presume were acquainted, at that time, with the draft in favor of the trustees; yet they permitted this arrangement to proceed undisturbed, until they filed the present bill in November 1823. For the amount due on this bill of exchange, they have Richard Steele liable to them as the acceptor. It is true, they are not bound to resort to the acceptor of the bill, but may urge their claim upon the partnership property, when the property has not been disposed of, or the

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disposition is fraudulent. But where there are conflicting claims, the manner in which those claims are secured, is resorted to as a means of determining their comparative merit. So, in this case, the complainants have not the same plea for interfering with any disposition of the partnership property that they would have had, if they had no security for their demand. It should however be remembered, that the bill charges that Richard Steele is not able to pay the whole of their demand. On the other hand, his entire ability to pay the whole is asserted by the answers; and no proof is adduced on the subject. The answers also state, that the complainants have instituted suit against him, and have stayed the proceedings until this suit is determined; and that this suit is prosecuted for his benefit: so the presumption is, that the complainants have ample security for their debt. In thus stating the merits of the complainants' demand, we do not contrast it with the demand of the trustees, on the ground that the trustees had originally any claim on the partnership property, but on the ground that they have received a legal claim to, and possession of, a part of the partnership funds, and at a time when the partners had entire control over their property; and our object is to show, that if any claim could be strong enough to [*60] defeat the *claim of the trustees, that the complainants have not made out such a claim.

But it is urged, that if the complainants have not shown themselves entitled to divest the defendants of these funds, on account of their having security for their debt; yet that Richard Steele, as he has to discharge this bill of exchange, which it is said was accepted for accommodation only, should be considered as a creditor of the said firm; and that the arrangement with the trustees should be set aside in his favor. But, when his agency in this business is considered, it is impossible to suppose that the trustees have committed a fraud against him, or have taken any undue advantage of him.

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We have, throughout this case, considered Beach in the same situation, as the trustees of Clarksville, as he was a member of that corporation, and was individually apprised of the nature of the securities he obtained with the transfer on the demand of the trustees; so that it is unnecessary to investigate a question that has been stirred, whether he has paid the full consideration to the trustees for their claim. He is entitled at all events, as far as the complainants and Richard Steele are concerned, to all the advantages that could be claimed by the trustees. And we see nothing in the case, thus far, to authorize a Court of equity to rescind the contract with the trustees, or to divest Beach of any legal advantage he has obtained.

There is another feature of the complainants' case that merits some attention. A written agreement was entered into on the 9th of November, 1822, between William Steele and Beach, by which William Steele was to furnish Beach with a quantity of salt at a stipulated price, sufficient, with what salt he had received, to pay off the demand of the trustees: *The salt to be delivered in ten days, and the order on Wurts to be given up.* It does not appear that either part of this agreement was fulfilled. The salt was not delivered, nor the order given up. Beach in his answer states, that the order was not to be given up until the salt was delivered. But the complainants contend, that, according to the agreement, the order was to be given up unconditionally; and that no condition can be annexed to it by parol. This agreement is not a deed, and what right William Steele might have had under it

to demand this order, before the failure to comply [*61] with the agreement on his part, need not now be inquired into; for the failure to deliver the salt, presents a total failure of the consideration on which the order was to be given up. So that neither law nor equity would require Beach to deliver up the order. This circumstance, therefore, can not affect the case of the complainants. Their bill was correctly dismissed by the Circuit Court.

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Per Curiam.—The decree is affirmed with costs.

Dewey and Nelson, for the plaintiffs.

Howk, for the defendants.

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JURISDICTION—WAIVER—CHANGE OF VENUE.—The record showed that a suit had been commenced in the Orange Circuit Court, and that a declaration and plea had been therein filed; that the declaration and plea, with an affidavit for a change of venue, were afterwards on file in the Washington Circuit Court; that the cause was tried, and a verdict rendered for the plaintiff, a new trial granted on the defendant's motion, a second verdict and final judgment rendered for the plaintiff, in the last-named Court. *Held*, that the circumstance of the record's not showing an order for a change of venue, could not be assigned for error, no objection having been made below to the jurisdiction of the Washington Circuit Court (a).

EVIDENCE—SHERIFF'S RETURN.—In an action against a sheriff for a false return, the execution is admissible in evidence, though it do not specify the day on which it is returnable.

SAME—FORM OF RETURN.—The sheriff's return to a fieri facias was, that he had not levied because the plaintiff would not give him an indemnity: *Held*, that this was a return unknown to the law, and that the cause must stand as if no return were made (b).

EXECUTION—LEVY—INDEMNITY.—Even if such an indemnity could be required in any case, it should be demanded as soon as the circumstances authorizing the demand were known to exist.

SAME—DUTY OF OFFICER.—If the sheriff, in consequence of vague rumors as to whether certain goods are the debtor's or not, return nulla bona without having the right of property tried by a jury,—he will be liable for a false return, on proof that the goods were subject to the execution.

SHERIFF—AUTHORITY OF DEPUTY.—If it appear that a person has acted generally as a deputy sheriff, with the sheriff's knowledge and consent, the sheriff is liable for the official acts of such person, though he may not have given him any express authority.

PRACTICE—DISPERSION OF JURY—NO ERROR.—The jury, about to retire to consider of their verdict, were instructed by the Court, that should they agree before the meeting of the Court on the following day, they might seal up their verdict, disperse, and hand in their verdict on the next morning. *Held*, 1st, that as the record did not show the dispersion of

(a) 6 Blkf. 529; 4 Ind. 2 ; 19 *Id.* 324; 46 *Id.* 315. (b) 44 Ind. 490-507.

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the jury, no objection founded on their dispersion could be noticed on a writ of error; 2dly, that as the instruction was not objected to when given, the dispersion were it shown could not be assigned for error (c).

[*62] *ERROR to the Washington Circuit Court.—
Action on the case by Farquar and Collins against Bosley, sheriff of Orange county, for a false return to a writ of fieri facias. Plea, the general issue. Verdict and judgment for the plaintiffs.

HOLMAN, J.—Farquar and Collins in their declaration against Bosley, show the recovery of a judgment in their favor against H. Stephen, for 138 dollars and 92 cents; and the issuing of a fieri facias thereon, which was placed in the hands of Bosley as sheriff; averring that Stephen had sufficient property to satisfy said execution; but that Bosley refused to levy the execution, and falsely returned it not levied, because the plaintiffs would not give him a bond of indemnity; and averring also, that the sheriff never requested a bond of indemnity of the plaintiffs. The defendant pleaded not guilty. This declaration and plea were filed in the Orange Circuit Court. Afterwards, they, together with an affidavit for a change of venue, were found among the records of the Washington Circuit Court. No order for a change of venue appears, but no objection was made to the jurisdiction of the Washington Circuit Court, where the case proceeded through several continuances, and two trials by jury, to a verdict in favor of the plaintiffs, on which judgment was given. After the first verdict, the defendant obtained a new trial. When the second verdict was found, he again moved for a new trial, which was refused; whereupon he filed a bill of exceptions setting forth the whole of the evidence.

The bill of exceptions contains the judgment in favor of the plaintiffs, the fieri facias that issued thereon, and the sheriff's return. It also contains a judgment in favor of Clendenin against H. Stephen, for 271 dollars and 75

(c) See post, 114; 3 Blkf. 27; 37 Ind. 469; 34 Id. 464; 36 Id. 288; 40 Id. 289; 48 Id. 207.

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cents, and a fieri facias thereon, which was levied on a variety of articles of household furniture, a lot of fur, and a number of law books in the hands of third persons. This property, except the lot of fur and the law books, was sold for 130 dollars and 53 cents. The lot of fur was claimed by J. Stephen, the right of property was tried, and found against the claimant, who appealed to the Circuit Court; and the books were not sold for the want of buyers. A venditioni exponas issued for the sale of the books. These books were principally in the possession of Blanchard, who claimed a lien on them for 170 dollars, and who refused to give them up until that sum [*63] was paid. The books, thus *situated, sold for 400 dollars under an agreement between H. Stephen and the purchaser, that, after satisfying the execution, the purchaser should retain the balance of the purchase-money. The witness does not know that they would have sold for as much on a regular sale.

It appeared in evidence, that the plaintiffs' and Clendenin's executions were both placed in the hands of Lindley, as the deputy of Bosley, on the same day, but that the execution of the plaintiffs was first, and that Lindley was charged by one of the plaintiffs to levy it first, or he would hold him responsible; that a day or two afterwards, Clendenin took his execution out of the hands of Lindley and placed it in Bosley's hands, and on Bosley's refusing to levy it without a bond of indemnity he gave the indemnity; and that afterwards, on the same day, Lindley placed the execution of the plaintiffs in Bosley's hands; and that Lindley generally acted as a deputy sheriff under Bosley. One of the witnesses had an impression that Bosley told him that Lindley was his deputy. It also appeared in evidence that an idea prevailed, that the property of H. Stephen was not liable to execution, and that Bosley had received the opinion of an attorney at law to that effect, by whom he was advised to

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exact a bond of indemnity of the plaintiffs before he levied their execution.

Objections were made, by the defendant, to the reading of the judgments and executions in evidence; and to the execution of the plaintiffs in particular, because the return day was not inserted; but the Court permitted them to go in evidence to the jury.

The defendant moved the Court to instruct the jury, that under the circumstances of doubt, in which H. Stephen's property was involved, the sheriff was justified in not levying the plaintiffs' execution without a bond of indemnity; which instruction the Court refused to give. And the Court instructed the jury that if they were satisfied, from the evidence, that Lindley did act generally as the deputy of Bosley, and with Bosley's knowledge and consent, that Bosley was responsible for his acts, and that proof of a written appointment or bond was unnecessary.

In reviewing these proceedings, we can not but perceive that the objection to the jurisdiction of the Washington Circuit Court comes too late. If the venue [*64] had not been regularly *changed or not changed at all, from Orange to Washington, this matter should have been rectified in the Washington Circuit Court before any other proceedings were had in the case. As no objection was then made, nor in fact made at any time in that Court, none can avail here.

The motion to reject the plaintiffs' execution from being read as evidence to jury, because the return day was not inserted, was properly overruled. The execution commands the sheriff to return the money made, together with the writ, but does not specify the day when this is to be done; but that Court, no doubt, according to the act of assembly, had regular return days, so that the sheriff could be at no loss when the execution was to be returned. In England, executions are returnable to the terms of the Court, yet an execution returnable out of term is not void, but only voidable. *Campbell v. Cumming*,

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2 Burr. 1187. So also in New York, *Cramer v. Van Alstyne*, 9 Johns. R. 386. In Kentucky, an act of assembly requires that there should not be more than 90 days between the test and return day of an execution; yet it was there held, in an action for not returning an execution which was returnable more than 90 days from the test, that the execution was not void but only voidable, and that the sheriff was liable for not returning it. *Wilson v. Huston*, 4 Bibb, 332. Similar doctrine may be found in a variety of cases. See *Shirley v. Wright*, 2 Ld. Raym. 775, S. C. 2 Salk. 700; *Williams v. Rogers*, 5 Johns. R. 163, and the cases there cited. We consider that the omission of the day of return in this case did not render the execution void; the sheriff might have justified under it, and is liable for not levying it.

The reason assigned, in the sheriff's return for not levying this execution, is insufficient to justify or excuse him. The return is unknown to the law. There is no general rule laid down in the books on the subject of indemnifying the sheriff in doubtful cases. In the case of *Bayley v. Bates*, 8 Johns. R. 187, it is said to be the usual course for the sheriff to take an indemnity, by bond, from the plaintiff, if the question of property be doubtful or litigated. But it does not appear that the sheriff can demand an indemnity as a matter of right, or refuse to act if it is not given. Such appears to be the doctrine contained in the case of *M'George et al. v. Birch*, 4 Taunt. R.

585. There the sheriff had taken the goods of a [*65] bankrupt in execution, at * the suit of Cohen. The assignees gave notice to the sheriff that they claimed the goods. He apprised Cohen of this and requested him, either to authorize the delivery of the goods to the assignees, or to indemnify the sheriff; but Cohen refused to do either. He then desired the assignees to receive the goods and give an indemnity, which they also refused, and commenced an action against him. The state of the case being made known to the Court, they

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took measures to secure the sheriff; but the course pursued is very far from leading to the idea, that the sheriff would be excused from acting on the execution for want of an indemnity. It does not appear to be obligatory on the plaintiff to indemnify the sheriff in any case; and if he fails or refuses to do so, there are various methods suggested in the books by which the sheriff may be protected from injury. See the above cases of *M'George v. Birch*, and the cases cited in *Bayley v. Bates*. But we have seen no case where a sheriff is said to be excused in not acting on an execution for want of an indemnity. If an indemnity is offered, or given, the sheriff may be, and is, required to do many things that he would be justified in not doing if there was no indemnity; and if he refuses an indemnity, when offered, he will be held liable in many cases where he would be otherwise excused. *Bayley v. Bates*, supra; *Van Cleef v. Flett*, 15 Johns. R. 147; 3 Stark. Ev. 1344, and the cases there cited (1).

But even if a sheriff were justified in not acting on an execution unless an indemnity were given, it would seem to be a necessary part of the rule that he should apprise the plaintiff of the state of the case, and of his determination not to act without an indemnity. And this should be done when he received the execution; or, if the doubts in which the goods of the debtor were involved were then unknown, he should seek the earliest opportunity, after he ascertained that the goods were in dispute, to inform the plaintiff of the circumstances of the case. In this case the plaintiffs aver in their declaration, that the sheriff never requested an indemnity of them; nor does it appear that he at any time informed them that there was any necessity for an indemnity. His having neglected to give this information to the plaintiffs, and having given it to Clendenin, whereby Clendenin procured the levying of his execution, seems to manifest on the part of

[*66] the sheriff, a disposition to give undue *preference

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to the younger execution; an evil against which the rules of law are intended to guard.

When a sheriff receives a fieri facias, it is his duty to use due diligence in searching for the property of the debtor; and if he finds it involved in doubt and dispute, he should make every inquiry that the nature of the case presents, in order to ascertain to whom it actually belongs; and for this purpose he may have the right of property tried, as directed by the act of assembly (2). But if he should be influenced by vague and uncertain rumors, as to the goods of the debtor, and, without inquiring into the right, should return nulla bona, and it should afterwards appear that the goods were liable to the execution, there can be no doubt but that the sheriff would be liable for a false return. 3 Stark. Ev. 1344.

In this case the return being unknown to the law, is as if there was no return at all, which, in legal construction, is a false return; and such in fact is the effect of this return, if taken in the full force of its expressions; it conveys the idea that the sheriff has not acted on the execution. But suppose the sheriff, in this case, had returned nulla bona, the usual return when the sheriff supposes he is justified in not levying on the supposed property of the debtor, and the facts that appeared in the proceedings under Clendenin's execution, had been shown in evidence—can there be a question but that the sheriff would be liable for a false return? The execution of the plaintiffs was for 138 dollars and 92 cents, and the goods sold on Clendenin's first execution amounted to 130 dollars and 53 cents, nearly enough to satisfy the execution; and, about the ownership of these goods, there does not appear to have been any doubt or dispute whatever. This, with the sale of the books, for a sum so far above what would have been required to satisfy the execution of the plaintiffs, shows conclusively that if the sheriff had levied their execution, instead of Clendenin's, that it might have been satisfied. Nor does it appear that the sheriff experi-

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enced any peculiar difficulty, or was exposed to any peculiar danger, in making this levy and sale; nothing has been seen that suggests any other idea than that the sheriff, with ordinary diligence, might have known the true state of so much of the debtor's goods, as [*67] would have satisfied the execution of *the plaintiffs. So that, in every point of view, we think the sheriff's return unwarranted by law.

The instructions given by the Court to the jury, respecting the liability of Bosley for the acts of Lindley, were correct. If Lindley acted generally as the deputy sheriff of Bosley, with Bosley's knowledge and consent, Bosley should be liable for his official acts, even if he had never given him express authority.

After the jury in this case were sworn, and the evidence heard, the Court, being about to adjourn, authorized the jury, that, if they made up their verdict before the Court was again open, they might seal it up and disperse, and hand in their verdict when the Court opened the next morning. The next morning the verdict was given in, and this is assigned for error. But the plaintiff in error should recollect that it does not appear of record that the jury did disperse; they may have continued in their room all night; nor does it appear that the plaintiff in error made any objection to this direction of the Court. If no objection was made at the time to the dispersion of the jury, after they had made up and sealed their verdict, there was no error committed, even if the jury had left their room according to the privilege given by the Court (3).

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

Rowland and Farnham, for the plaintiff.

Nelson, for the defendants.

(1) If the property in goods taken under an execution be in dispute, as frequently happens in the case of bankruptcy, &c., the Court upon the suggestion of this or any other reasonable cause, by the sheriff, will enlarge

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the time for making the return, until the right be tried, or until one of the parties have given the sheriff a sufficient indemnity. Semb. 7 T. R. 173; 2 W. Bl. 1064, 1181; 7 Taunt. 294; 1 Bingham 71. This, however, is not to be considered a general rule; but the indulgence will be granted only in special cases, under particular circumstances, because the sheriff, where the property is in dispute, may summon an inquest to say whose property it is, before he returns the writ. But in all cases where the doubt arises from a point of law, and not from mere matter of fact, the Court upon application will enlarge the time for making the return. See 4 Taunt. 585; 7 T. R. 173; 1 Taunt. 120; 1 Arch. Pr. 288.

The following are some of the cases on this subject:

Where a commission of bankrupt has been issued against a defendant, and his assignee claim the property, and the plaintiff refuses to indemnify the sheriff, the Court will enlarge the time for the sheriff's returning the fieri facias until the next term. But there must be a rule to show cause.

Ledbury v. Smith, 1 Chitt. R. 294.

[*68] *An action having been brought against the sheriff by the assignee of a bankrupt for taking goods after the bankruptcy, on a writ issued out of C. P., in which Court time had been given to return the writ, this Court, K. B., staid the proceedings until an indemnity was given to the sheriff, on the terms of his paying over to the assignee the money levied, and the costs of the action against the sheriff. *Probinia v. Roberts*, 1 Chitt. R. 577.

A sheriff may apply to the Court for a rule to enlarge his return to a venditioni exponas, from term to term, if the defendant become bankrupt, unless he be indemnified by the assignees in paying over the money levied under it, or the rule for such enlargement be duly discharged. *Venables v. Wilks*, 4 J. B. Moore, 339.

A rule to show cause, why the rule calling on the sheriff to return a fieri facias, should not be enlarged until the sheriff should be indemnified, was obtained. On the facts being disclosed, the plaintiff contended that he was not bound to indemnify the sheriff, because he had a right to seize the goods, which were the defendants's, wherever he could find them. A third person, who claimed the goods, submitted that he was not bound to give an indemnity, as he was clearly the owner of the goods. The Court said, that as there was considerable difficulty in determining which of the parties was entitled to have the goods, the sheriff ought not to be called upon to come to that determination; the sheriff ought therefore to be indemnified. The rule for enlarging the time for returning the writ must consequently be made absolute. *Clegg v. Woollan*, M. T. 1830, K. B. 1 Leg. Obs. 108.

A rule was obtained to show cause why the sheriff should not have further time to return the writ of fi. fa. directed to him, and under which he had levied. From the facts disclosed, on showing cause, it appeared that whether the property of the defendant vested in his assignees under a commission of bankrupt, depended on the construction to be put on a statute of 6 Geo. 4. The Court thought that the act did not vest the goods of the defendant in the assignees; yet that, as it appeared a question liable to doubt, the sheriff ought to have time to consider the course he would pursue. The Court said that the rule, therefore, would not be made absolute in the common form, but for enlarging the rule to return the writ until the end of the next term. The sheriff might of course in the meantime, come to the Court and apply to enlarge the time still further. Rule absolute. K. B. M. T. 1830, *Ibberson v. Dicus*, 1 Leg. Obs. 109.

Richards showed cause against a rule, calling on a defendant to show cause why the sheriff should not have time to return the writ until the first day of the next term. The fi. fa. had been made returnable on Monday next after the morrow of St. Martin. On the 1st of November, the writ had been delivered at the sheriff's office, and the sheriff accordingly proceeded

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to levy. He was then informed, that the whole of the goods on the premises had been assigned to a person named John Jones. There was no reason stated for suspecting the assignment to be fraudulent, except that Jones was the nephew of the defendant. The parties all lived in the neighborhood, and consequently ample opportunity was afforded of inquiring into the circumstances under which the assignment took place. This was not the ordinary case of an application by the sheriff for indemnity. There was here no bankruptcy. Tomlinson, in support of the rule, stated that an application had been made by the sheriff, both to the execution-creditor and to the assignee of the property, for an indemnity; but it had been refused by both. LITTLEDALE, J., observed, that in the case of a bankruptcy, it was a matter of course to grant time to the sheriff to return the writ until an indemnity was given; and here, he thought, it was only right that the sheriff should have a reasonable time, until the first day of the next term, for the purpose of inquiring into the matter. Rule absolute. K. B. M. T. 1830, *Sutton v. Jones*, 1 Leg. Obs. 175.

[*69] *The sheriff seized, under an execution issued by Antrobus against Lautour, goods which were in the possession of Beavan under a bill of sale from Lautour, notwithstanding notice of the bill of sale. The sheriff then applied to Antrobus and to Beavan severally for an indemnity before proceeding further, but both refused. Beavan sued the sheriff in trespass for the seizure. Rule nisi to stay proceedings till the sheriff should have been indemnified. Upon cases being shown, TINDALL, C. J. said: This case falls within the general principle, that the sheriff is not, at his own expense, to fight the cause of the contending parties. The proceedings must be staid till an indemnity has been given, and without payment of the plaintiff's costs, because the plaintiff has refused to indemnify when requested. Rule absolute. *Beavan v. Dawson*, 6 Bingh. 566. Vide, also *Keightley v. Birch*, 3 Campb. 523; *Barnard v. Leigh*, 1 Stark. R. 43; *King v. Bridges*, 7 Taunt. 294.

Case in New York, against a sheriff for a false return of nulla bona to a fi. fa. The defence in part was, that a third person claimed the goods, and that an indemnity was thereupon required, but not given. Per Curiam. It was the duty of the sheriff to make the levy without any indemnity whatever, as he found the goods in the hands of the defendant in the execution; and he would not have been liable to an action as a trespasser, if he had made such levy. The goods were pointed out to him: as the goods of the defendant in the execution; he was exercising acts of ownership over them; they were in his exclusive custody and possession; and the sheriff would have incurred no peril from the act of levying. If, after the officer's first duty was performed, a claim to the property had been interposed, then a jury should have been called to determine the right of property. If by the inquisition, it should be determined that the right of property was in the claimant, then the return upon the execution, should be nulla bona; and such a finding, although it would not be conclusive upon the question of property, would nevertheless justify such a return. Should the jury declare the property to be in a third person, then the sheriff could not be compelled to proceed further, without a full indemnity. But, in the first instance, he was bound to make a levy, and there is nothing in this case to excuse his neglect in that particular. The sheriff need never be in difficulty upon this point; for if the title appears doubtful, or the proceedings hazardous, the Court upon application, would extend the time for the making of his return; or he might file a bill of interpleader, and stay all proceedings against him, until the right of property was settled. Indeed, the conflicting claimants could be compelled to litigate their claims; and a sheriff, taking the proper course, would never be subjected to damage of any kind. In this case the sheriff refused, or, at all events, neglected to make the levy; and if the plaintiff can show that the goods, found in the

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possession of the defendant in the execution, were in truth his property, he is entitled to recover. *Williams v. Lowndes*, 1 Hall, 579.

(2) There is a difference of opinion in the English books as to the effect of such an inquisition. CROSE, J. and KENYON, C. J., have expressed an opinion, that the inquisition would justify the sheriff in returning, if so found, that the defendant has no goods within the county; or that, if it be found that he has, the inquisition will mitigate the damage, in an action of trespass, should the goods turn out not to be the defendant's. *Farr v. Newman*, 4 T. R. 633, 648; *Roberts v. Thomas*, 6 id. 88. But it has been since decided, that the inquisition finding the goods to belong to a third person, is not admissible evidence for the sheriff, even in mitigation of damages, in an action against him for a false return of nulla bona. *Glossop v. Pole*, 3 M. & S. 175. Though in trespass against the sheriff by a third person claiming the goods, the inquisition, said the Chief Justice, in the case [*70] last-cited, might perhaps be evidence as to whether the sheriff had acted maliciously. *Ibid.* It is also held that an inquisition made by the sheriff's jury to ascertain to whom the property of goods taken under a fi. fa. belongs, though found in favor of a stranger claiming the goods, is not admissible evidence in an action of trover for the goods, brought by the claimant against the sheriff. *Latkow v. Eamar*, 2 H. Bl. R. 437.

The Indiana law is as follows: When any person, not the execution-defendant, files with the officer issuing the execution a claim in writing to the goods levied on, supported by an affidavit, the officer who has levied on the property, on being notified of the filing of such claim and affidavit, summons three householders to determine the right of property. The trial is held before a justice of the peace of the township in which the property is found. An appeal lies from the decision of these triors to the Circuit Court of the county. In all cases where a trial of the right of property has been had, the decision, whilst unreversed, is conclusive between the parties. No officer is liable to any prosecution for taking the goods of a stranger in execution if found in the defendant's possession, unless he be informed of the ownership therein previously to the execution-sale. R. C. 1831, pp. 237, 238.

(3) Indictment for a conspiracy. The evidence for the prosecution not being closed until 11 o'clock at night, the trial was adjourned till the next morning, and the jury were permitted by the judge to retire to their families for the night. On the next morning the jury assembled, and the trial was concluded. Verdict of guilty against three defendants. Motion for a rule to show cause why a new trial should not be granted, in consequence of the dispersion of the jury without the defendant's knowledge. ABBOTT, C. J., after stating that the dispersion of the jury did not vitiate the verdict, and that cases similar to the present had of late years frequently occurred, observed: "It is said, that in some of those instances the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion that that can make no difference. I think the consent of the defendant in such case ought not to be asked; and my reason for thinking so is, that if that question is put to him, he can not be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it; for if he refuses to accede to such an accommodation, it will excite that feeling against him, which every person standing in the situation of a defendant would wish to avoid. I am also of opinion, that the consent of the judge would not make, in such case, that lawful which was unlawful in itself; for if the law requires that the jury shall at all events be kept together until the close of the trial for a misdemeanor, it does not appear to me that the judge would have any power to dispense with it. The only difference that can exist

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between the fact of a jury separating with or without the approbation of the judge, as it seems to me, is this, that if it be done without the consent or approbation of the judge, expressed or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But though it may be a misdemeanor in them to separate without his consent, it will not avoid the verdict in a case of this kind, as it would if the law required the jury to be absolutely kept together. Now, it is not surmised in this case, that during the night (for it was during night only that the separation took place) any attempt was made to practice upon the jury. If any thing like that could have been shown, the Court would require that matter to be investigated. The other judges expressed similar opinions; and the rule was refused. *The King v. Woolf*, 1 Chitt. R. 401. Vide *Barlow v. The State*, Nov. term, 1827, post and note. *Smith v. Thompson*, 1 Cowen, 221 and note.

[*71] *HARRIS, Administratrix, v. M'FADDIN.

OFFICER—JUSTIFIED BY WRIT.—The warrant of a justice of the peace, issued under the statute of 1824, commanding the constable to distrain for rent,—is a justification to the officer in an action of replevin by the tenant, independently of the landlord's claim (a).

SAME—PRACTICE.—If the constable justify under his warrant, and obtain judgment on a demurrer to his plea, he is entitled to a return of the goods.

LANDLORD AND TENANT—DISTRRAINT.—If the tenant wish to contest the landlord's right to distrain, to rely, for example, on *non tenuit* or *riens in arrear*,—he should institute his suit against the landlord (b).

DEMURRER—JOINDER.—The defendant, on a demurrer to his plea, obtained a judgment, without having joined in a demurrer: *Held*, that the plaintiff could not assign the want of the joinder for error.

APPEAL from Vigo Circuit Court.—This was an action of replevin by Harris, administratrix, against M'Faddin. The declaration is in the usual form. The defendant pleaded specially, that he took the goods by virtue of a distress warrant, directed to him as constable of the township, issued by a justice of the peace, commanding him to distrain the goods of the plaintiff for one year's rent due to Modisett, the plaintiff's landlord. The warrant is set out in the plea. General demurrer to the plea, and judgment for the defendant, not only of *nil capiat per breve*, but also for a return of the goods.

(a) 2 Ind. 579. (b) 5 Blkf. 489.

Harris, Administratrix, v. M'Faddin.

BLACKFORD, J.—In this case, if the defendant be viewed as a bailiff making cognizance, the plea is defective for not averring the right of the landlord. We conceive, however, that this plea is to be tested by a different principle from that which governs a cognizance. The statute of 1824, p. 160, has changed the practice. The landlord can not in person, or by his bailiff, take the goods. He must go before a justice of the peace of the township, and, on complaint under oath, obtain a warrant commanding the constable, to whom it is directed, to make the distress. This warrant, issued by a competent authority, is obligatory on the officer, and must be a justification to him independently of the landlord's claim. *Roberts et al. v. Tennell*, 4 Littell's R. 286. The judgment of the Circuit Court, therefore, upon the demurrer, that the plaintiff take nothing by his writ, was correct.

We are also of opinion, that no objection can be made to the award of a return of the goods. The plea [*72] shows that the *original taking by the defendant was lawful, and nothing appears of record inconsistent with the continuance of his right to the possession.

If the plaintiff wished to contest the right of the landlord to distrain—to rely, for example, on *non tenuit*, or *riens in arrear*—he should have instituted his suit against the landlord. It is against him or his bailiff, not against the officer of the law, that in cases of distress for rent, the person distrained on, when he replevies, gives bond for the due prosecution of his suit.

The want of a joinder in demurrer is assigned for error. There is nothing in this objection. The plaintiff had a right to rule the defendant to join, or to add the joinder himself, and can not now for the first time object to the omission.

Per Curiam.—The judgment is affirmed with costs.

Judah, for the appellant.

Lutz and Another v. Lutz.

LUTZ and Another v. LUTZ.

WILL—CONSTRUCTION—HOUSEHOLD GOODS.—A testator, commencing his will by expressing an intention to dispose of all his worldly estate, devised to his wife all his lands and tenements for life, together with all his household goods and chattels. If his wife married again, she was still to enjoy the real estate, but without power to dispose thereof except by leasing it for a term not exceeding one year at a time. If she married and died without issue, the real estate was to descend to a nephew of the testator; but if she had issue, the estate was to descend to such issue. The testator died, having made no further disposition of his property, and leaving no children.

On a claim by the testator's brothers, his heirs at law, *Held*, that all the personal estate including moneys and obligations passed, by the will, to the widow of the deceased.

SAME—INTENTION.—The construction of a will depends, not so much upon any rigid principle of law, as upon what appears by the will to have been the testator's intention (a).

ERROR to the Clark Circuit Court.

SCOTT, J.—Casper Lutz, in his last will and testament, bequeathed to his wife Catharine all his lands and tenements, with all the benefits and profits thereunto belonging, to be freely possessed and enjoyed by her during her natural life, together with all his household goods and chattels; and made and ordained her his executrix, and his brother Henry Lutz, executor. A further provision [*73] of the will is, that should his said wife *Catharine marry after his decease, she should still possess and enjoy his real estate; but should have no power to dispose of the same, or to lease it for more than one year at a time. And should she die without issue of her body, then in that case, the said real estate should descend to Alexander Joseph Lutz, the son of his brother, Henry Lutz. But in case the said Catharine should have a child or children, then the said real estate should descend to the said child or children; and the testator directs his executors to collect his debts, &c. On the 6th of Sep-

 (a) 7 Ind. 282; 16 *Id.* 479; 35 *Id.* 116; 39 *Id.* 58.

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tember, 1818, Casper Lutz died without children, and his brothers, Henry and Jacob, filed their bill in the Circuit Court, complaining that the said Catharine, in violation of the provisions of the said will, retained the exclusive possession and control of the goods, chattels, moneys, and obligations of said estate, except about 300 dollars; and stating, also, that the said moneys and effects do not pass to the said Catharine by the will; but that they descend to the complainants as the brothers and legal heirs of the deceased. There was a demurrer to the bill, and decree in favor of the defendant.

The only question presented for our consideration is, whether the moneys and obligations go to the widow or descend to the heir at law, as property not disposed of by the will?

This is not an instrument in which the intention of the maker must yield to any rigid principle of law. The intention of the testator, in such cases as the present, must prevail. As this instrument was evidently not drawn by a skillful hand we must seek for the intention of the testator, rather from its general features than from a strict grammatical construction of language. The whole difficulty seems to have arisen from the word *household* being used in that clause of the will, which disposes of the personal estate. If we suppose the word *all* as having application to the word *chattels*, as well as to *household goods*, then, by supplying the ellipsis, the bequest would include all his household goods, and all his chattels; which would be all his personal estate. Or, if the word *household* be rejected as useless and unmeaning, the same result follows: and we are the more strongly inclined to believe that this was the intention of the testator, from his clear expression, at the commencement of the instrument, of

his intention to dispose of the wordly estate where-
[*74] with it had pleased God to *bless him in this life.

Comparing this declaration of the testator's intention, with his subsequent distribution, we can not hesi-

Parks, Administrator, v. Perry, in Error.

tate to believe that his design, in the clause above alluded to, was to give his wife all his personal estate; and not to leave the moneys and bonds, forming so important a part of it, undisposed of (1). We therefore think the decision of the Circuit Court correct.

Per Curiam.—The decree is affirmed with costs.

Thompson and Naylor, for the plaintiffs.

Howk, for the defendant.

(1) "The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. Doug. 322. 1 Bl. R. 672. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically *the will* of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' 2 Bl. Comm. 499. These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law.

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words, and ascertaining the meaning in which the testator used them." Per MARSHALL, C. J., in *Smith v. Bell*, 6 Peters, 68, 75.

PARKS, Administrator, v. PERRY, in Error.

WILL—PRIORITY OF LEGACIES.

A WILL, after directing the personal estate to be sold, and the real estate leased until the rents, with the proceeds of the sale of the personal property, should be sufficient to pay the after-named legacies, contained the following provision: "I will and bequeath to my sister Isabel the sum of 50 dollars annually, to be paid out of the rents of the place and the proceeds of the sale of my personal property, and continued until the following sums are paid." The will then gave several legacies, and directed that after their payment, the real estate should be sold and a distribution made.

Held, that in each year the 50 dollars were to be paid to Isabel, before any payment to the other legatees.

Neighbors v. Simmons.

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*NEIGHBORS v. SIMMONS.

WRITTEN CONTRACT—STATUTE OF LIMITATIONS.—At the foot of an account containing several items, charged in 1817, there was the following acknowledgment: "I acknowledge the above account to be just.—*Thos. Neighbors.*" Held, that this acknowledgment was a written contract which, under the act of assembly, was not barred by the statute of limitations (a).

ERROR to the Marion Circuit Court.

HOLMAN, J.—Assumpsit by Simmons against Neighbors. The declaration states that the defendant, on the 14th of April, 1817, made his certain acknowledgment in writing, whereby he acknowledged that he was indebted to the plaintiff in the sum of 112 dollars and 62 cents, whereby he became liable, &c., and in consideration thereof promised to pay, &c. Plea, non-assumpsit within five years. Demurrer and judgment for the plaintiff.

The contract, on which the action is founded, is an account of sundry items in favor of Simmons against Neighbors, amounting to 112 dollars and 62 cents; the first item of which bears date the 20th of January, 1817, and the last item the 14th of April, in the same year; at the foot of which there is this writing: "I acknowledge the above account to be just.—*Thos. Neighbors.*" The act of assembly provides, that no statute of limitations shall be pleaded as a bar, or operate as such, to any action founded on an instrument or contract in writing, whether the same be sealed or unsealed (1). We are of opinion that the written acknowledgment of this account forms a contract in writing; and that the plea of the statute of limitations, in this case, was inadmissible.

With the refusal of the Circuit Court to continue the cause we have nothing to do: the affidavit to continue the cause is no part of the record.

(a) See 12 Ind. 174; 3 *Id.* 275.

Maguire v. Nowland.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

Sweetser and Wick, for the plaintiff.

Fletcher, for the defendant.

(1) R. C. 1824, p. 291. Acc. R. C. 1831, p. 401.

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*MAGUIRE v. NOWLAND.

STATUTES—PROSPECTIVE—JURISDICTION.—The act of 1827, giving the Supreme Court jurisdiction in certain cases decided by the Circuit Court on appeal from the judgment of a justice of the peace, is prospective only, and does not apply to cases determined by a justice before the taking effect of the act (*a*).

ERROR to the Marion Circuit Court.

BLACKFORD, J.—This judgment of the Circuit Court was in a case from a Justice's Court. Previously to the late act of the legislature, approved the 22d of January, 1827, this Court had no jurisdiction of such cases. That act makes some alterations in the mode of proceeding before justices of the peace; and, where the judgment of the Circuit Court is in a case where the judgment of the justice exceeds 20 dollars, the act gives this Court jurisdiction of the cause. We are of opinion, however, that this act of the legislature is prospective only, and was not intended to embrace any cases, except where the rendition of the justice's judgment is subsequent to the taking effect of the statute. The judgment of the justice, in the case before us, was rendered long before the taking effect of the act above referred to (1).

Per Curiam.—The cause is dismissed for want of jurisdiction.

Sweetser and Wick, for the plaintiff.

Fletcher, for the defendant.

(a) See 7 Ind. 59; 16 *Id.* 84.

Jamison v. Buckner.

(1) The law on the subject is now as follows: "Writs of error issuing from, and appeals made to the Supreme Court, shall extend to all judgments and decrees, given by any of the inferior Courts of record, except such judgments as have been or may be rendered by any of the inferior Courts, confirming or reversing the judgment of any justice of the peace, where the amount in controversy, inclusive of interest and costs, is under the sum of twenty dollars: Provided, that in all cases where judgment is rendered, affirming or reversing the judgment of any justice of the peace, on an appeal to any inferior tribunal, where the amount in controversy, inclusive of interest and costs, is under fifty dollars, if a supersedeas shall be refused, the Supreme Court shall have no jurisdiction." R. C. 1831, p. 149.

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*JAMISON v. BUCKNER.

CONSIDERATION—FAILURE OF—COMMON LAW REMEDY.—The act authorizing a defendant, in actions of assumpsit, to plead a want or failure of consideration specially, is cumulative, and does not take away the party's right, existing before the act, to avail himself of such a defence under the general issue (a).

ERROR to the Marion Circuit Court. Assumpsit by Buckner against Jamison. Plea, non-assumpsit. Verdict and judgment for the plaintiff.

SCOTT, J.—On the general issue, in an action for assumpsit, the Court refused to hear evidence, on the part of the defendant, of a failure of consideration. By our statute, regulating the practice in suits at law, the defendant is authorized to allege the want or failure of consideration, by special plea. R. C. 1824, p. 295 (1). Prior to the statute, evidence of that fact could have been given on the general issue. The statute is cumulative, and does not take away the right which existed prior to its enactment.

Per Curiam.—The judgment is reversed with costs.

Fletcher, for the plaintiff.

Gregg, for the defendant.

(1) Accord. R. C. 1831, p. 405.

(a) See 4 Blkf. 529-556; 5 *Id.* 334 (note).

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*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1827, IN THE TWELFTH YEAR OF
THE STATE.

WHITE, Administrator, *v.* RANKIN and Others.

APPEARANCE—WAIVER.—The appearance of a defendant on the execution of a writ of inquiry, without objecting to the previous proceedings, cures any irregularities as to the time when the *capias* was executed or the declaration filed (*a*).

ERROR—HARMLESS.—The awarding of a writ of inquiry after the defendant's failure to appear on being called, without the previous entry of an interlocutory judgment, is a mere informality, and can not be assigned for error.

PARTIES—DESCRIPTIO PERSONARUM.—A declaration stated that A., B. and C., county commissioners of the county of Scott, complained of the administrator of D. for money had and received by the intestate to the use of the plaintiffs, and which he had not paid to the plaintiffs: *Held*, that the words, "county commissioners of the county of Scott," were only a *descriptio personarum*.

ERROR to the Scott Circuit Court.—*Assumpsit* by Rankin, Hogland, and Matthews, commissioners of Scott county, against White, administrator of White, for money

(*a*) 9 Ind. 6.

White, Administrator, v. Rankin and Others.

had and received by the intestate to the use of the plaintiffs. The defendant, at the term to which the writ was returnable and at which the declaration was filed, failing to appear on being called, and the Court being satisfied that the process had been served, a writ of inquiry was awarded to inquire of the damages, &c. At a subsequent term, to which the cause had been continued, and at which the defendant appeared, the damages were [*79] assessed and *final judgment was rendered for the plaintiffs. The judgment was as follows: "It is therefore considered by the Court, that *the plaintiffs* recover of the said defendant, as administrator as aforesaid, the sum of, &c., to be levied, &c."

HOLMAN, J.—The first error assigned and relied on in this case, is, that the writ of inquiry was improperly awarded. It is said, that the capias was not executed ten days before the term of the Court in which the writ of inquiry was awarded; and the declaration, it seems, was not filed when the capias issued, but was filed in open Court, and but one day before the defendant was called, and the writ of inquiry awarded; and there was no interlocutory judgment. The awarding of the writ of inquiry, without an interlocutory judgment, was merely informal. Had the writ been executed the same term in which the declaration was thus filed, the defendant might have had some cause of complaint; but the cause was continued for several terms; and before the inquest of damages, the defendant appeared by his counsel. Having thus appeared and raised no objections to the proceedings in the cause, all previous irregularities are thereby cured.

A second train of objections grows out of the declaration. The declaration states that Samuel Rankin, Spencer Hogland, and John Matthews, county commissioners of the county of Scott, complain of James V. White, administrator of James L. White, deceased, of a plea of trespass on the case; for that whereas James L. White, in his life time, was indebted to the plaintiffs in the sum of

White, Administrator, v. Rankin and Others.

100 dollars, for so much money, before that time, and had received by him to the use of the said plaintiffs; and the breach assigned is, that neither the intestate, nor the administrator, had paid the said sum to the said plaintiffs.

It is here objected, first, that the plaintiffs sued as a corporation, and appeared by their attorney at law, instead of their attorney in fact; secondly, that during the pendency of this suit, the powers and duties of the county commissioners were transferred, by act of assembly, to the board of justices: and that the commissioners ceased to have any legal existence, and could not therefore maintain the suit; thirdly, that the commissioners could sue for money due to the county only, which money is always payable to the county treasurer, and that there-

fore the breach, in this case, should have been, [*80] that the *money was not paid to the county treasurer. All these objections are answered together by a reference to the declaration. The plaintiffs in the Circuit Court do not appear to have sued as a corporation, nor for moneys due to the county. It is true that they style themselves county commissioners, but they do not state that the money is due to them as commissioners. They lay it as if due to them in their own right, for money had and received, not to the use of the county, but to their own use; and the judgment is given to them in their own right, and not for the use of the county. If this money belongs to the county, the way is open for the county to obtain it; but there is nothing in this record to show that the county has any claim upon it; so that the style of county commissioners, adopted by the plaintiffs, can only be considered as a *descriptio personarum*.

Per Curiam.—The judgment is affirmed with 5 *per cent.* damages.

Thornton, Thompson and Hawk, for the plaintiff.

Nelson, for the defendants.

Test v. Devers.

TEST v. DEVERS.

TRESPASS—COMPLAINT—CURED BY VERDICT.—The complainant, in an action of forcible entry and detainer, stated that the defendant with force and arms, unlawfully and forcibly entered upon the plaintiff's land (particularly described), and him the plaintiff with force and arms did expel and unlawfully put out of possession: *Held*, that this complaint could not be objected to after verdict, for not showing more particularly that the plaintiff had peaceable possession of the premises before the injury complained of (a).

SAME—VERDICT.—The verdict in the Circuit Court for the plaintiff, on appeal, in a case of forcible entry and detainer, must, as on the trial before the justice, be signed by all the jurors.

ERROR to the Rush Circuit Court.

BLACKFORD, J.—Devers filed a complaint of forcible entry and detainer, before two justices of the peace, against Test, and obtained a verdict and judgment. Test appealed to the Circuit Court. The verdict of the jury there was as follows: "We of the jury find for the plaintiff." The Circuit Court rendered judgment of restitution on the verdict. Test has brought the case before this Court by a writ of error. The following among others, are the errors assigned: first, the complaint [*81] filed *is insufficient; secondly, the verdict should have pursued the form prescribed by the statute.

The objection to the first count in the complaint is, that it contains no averment that the plaintiff had the peaceable possession of the premises, previously to the injury complained of. As to that, the complaint states, that the defendant with force and arms, unlawfully and forcibly, entered upon the plaintiff's land, (particularly described,) and him, the plaintiff, with force and arms did expel, and unlawfully put out of possession. This we consider amply sufficient after verdict. Whether the objection would have had any weight, had it been previously made, no opinion need be given.

(a) 53 Ind. 279.

Test v. Devers.

There is another count in the complaint, which is also objected to; but as the first is good, it is not material in deciding this case, to examine the other.

The objection made to the verdict, depends upon a mere question of practice. If the form, given by the statute in cases of forcible entry and detainer, must be substantially pursued in the Circuit Court, as well as before the justices, then this verdict is insufficient. In *Moore v. Read*, May term, 1822, we determined that a verdict in the Circuit Court, pursuant to the form in the statute, was correct (1). The act, prescribing the form of the oath to the jury, and that of the verdict, the nature of the judgment, and the form of the writ of restitution, in these cases before justices, authorizes an appeal to the Circuit Court, and directs that the Court shall hear and determine the case, agreeably to the true intent and meaning of that statute (2). The legislature probably intended, that the subject of inquiry for the jury, the forms of the verdict, judgment, and writ of restitution, in the Circuit Court, should be the same in substance as those before the justices, changing only what is necessary to be changed. Indeed no reason is perceived, why more particularity should be required in the one case than in the other; or why the nature of the inquiry, of the verdict, judgment, and execution, should not be the same in both. Considering, as we do, that that similarity is required by the statute, which is the only authority for this proceeding in forcible entry and detainer, the verdict in the present case must be deemed, in substance, defective. According to the statute, no judgment can be rendered in these [*82] cases for the *plaintiff, unless the verdict be signed by all the jurors. This verdict is not so signed; and for that reason alone, were there no other, the judgment rendered upon it can not be supported (3).

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Cone v. Cotton and Another.

Fletcher, for the plaintiff.

Sweetser and *Smith*, for the defendant.

(1) Vol. 1 of these Rep. 177.

(2) R. C. 1824, p. 212. Accord. R. C. 1831, p. 265.

(3) Accord. *Ward et al. v. Crane et al.*, May term, 1834.

CONE v. COTTON and Another.

OYER—PROFERT—PLEADING.—Although oyer of a record is not demandable, yet if profert of the record of a judgment on which the suit is brought be made and oyer granted, the defendant may demur if the judgment be of no validity. So if the judgment be of a justice's Court in another state, which is not a Court of record.

FOREIGN JUDGMENT—PLEADING—JURISDICTION.—A scire facias was issued by a justice of the peace in Ohio on the transcript of a judgment of another justice there; and, on a return of the writ "not found," judgment was rendered for the plaintiff. On that judgment, an action was brought in a justice's court of this state. *Held*, that the judgment, having been rendered without service of the writ, or the return of two nihilis, would not, on common law principles, support the action. *Held*, also, that if the judgment was authorized, by a statute of Ohio, on one return of "not found," the declaration should have shown that fact (*a*).

SAME—JURISDICTION—PROOF.—The constitution of the United States, requiring full faith and credit to be given in each state to the judicial proceedings of every other state, does not apply to a judgment which has been rendered without the defendant's having had legal notice of the suit.

ERROR to the Shelby Circuit Court.

HOLMAN, J.—Debt on a judgment of a justice of the peace of the state of Ohio. The plaintiff made profert of an authenticated transcript of said judgment. The defendants craved oyer of the transcript which was granted. And in this, it is said by the plaintiff that the Circuit Court erred. But it should be remembered, that, although oyer of record is not properly demandable, yet, if profert is made, and oyer granted, no error is committed.

[*83] So as it respects the transcript of this *judgment.

It is not a record; but as both parties have treated

(*a*) 34 Ind. 531; 63 *Id.* 137; 18 *Id.* 156; 8 *Id.* 453.

Cone v. Cotton and Another.

it as a record, we see no reason that either has to complain; and more especially in a case like this, where the sufficiency of the judgment to support the action will be the same, whether it is adjudicated upon a demurrer to the declaration, or when shown as evidence to the jury. The defendants having obtained oyer of the transcript, demurred and had judgment.

The transcript is as follows: *Charles Cone, Sen., v. William Cotton, Sen., and William Cotton, Jun., (bail).* In transcript. Transcript from the docket of John Garard, a late justice of the peace, in and for the township of Crosby, and county of Hamilton, and state of Ohio. Judgment entered by J. Garard, Esquire, on the 2d of February, 1821, against defendant for the sum of 43 dollars and 44 cents. The same had been taken by transcript from the docket of Joab Comstock, a late justice of the peace in and for the township of Crosby, and county of Hamilton, state of Ohio. Which justices, at this time, are both out of office. The date of the judgment entered by Joab Comstock, Esquire, is 30th of March, 1820. April 29th, 1825, I issued a scire facias against both defendants, returnable on the 4th May next. Scire facias returned on the 4th May. Defendants not found. May the 4th, I give judgment against the defendants in favor of the plaintiff for the sum of 54 dollars and 34 cents, and costs of suit.—John D. Moore, J. P.

To this is annexed the certificate of said Moore, that the foregoing is a true transcript of the proceedings had before him, and of the judgment entered by him. This is followed by a certificate of the clerk that Moore was a regular justice of the peace; the certificate of the presiding judge, &c. This authentication does not extend to the official acts of Garard and Comstock; but as this action is not founded on the judgment given by either of them, but on the judgment given by Moore on the scire facias, it is not directly material that we should have conclusive evidence that either Garard or Comstock acted

officially. The judgments given by them may be considered as only recited in the scire facias, and requiring no other proof, or authentication, than is required of any other judgment so recited.

This transcript gives no precise information of [*84] the object of *this scire facias. But whatsoever may have been the purpose to be effected by it within the compass of the common law, it must be regulated by the principles of the common law. Testing this scire facias by common law principles, we find that it has not been executed in such a way as would authorize a judgment. When a scire facias has not been executed by personal service, the common law requires that there should be a return of two "nihilis;" or, what in this country may be considered as equivalent, to returns of "not found." This scire facias was not executed by personal service, and there was but one return of "not found;" which would not warrant the judgment. Even if that provision in the constitution of the United States, that requires us to give full faith and credit to the judicial proceedings of other states, extended to the judgments of justices of the peace, it could not require us to consider such judgments valid, if given without notice, or what amounts to the same thing, without legal notice. See 1 Stark. Ev. 214, 215; *Bissell v. Briggs*, 9 Mass. R. 462; and the cases cited in *Borden v. Fitch*, 15 Johns. R. 121 (1). If we take it for granted, that constructive notice by two returns of "nihil," as authorized by the common law, would be sufficient; yet less than this can by no means suffice. If there is a statute of Ohio, authorizing a justice of the peace to give judgment on a scire facias, on one return of "not found," we know nothing of it, and can presume nothing about it. If the existence of such a statute had been averred in the declaration, we might have adjudicated upon its effect; as it is, we have nothing to do with it (2). As the case stands the judgment on which the plaintiff relies having been given with-

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out notice, either personal or constructive, is, on common law principles, a mere nullity; and, being unaided by any averment, forms no cause of action whatever. If oyer of this transcript had not been granted, and the cause had passed to a jury on the issue of nil debet, and the transcript had been offered in evidence, it must have been rejected, as affording no evidence of a demand against the defendants; so that the result would have been as it now is—the action would have been unsupported.

Per Curiam.—The judgment is affirmed with costs.

Wick, for the plaintiff.

Fletcher, for the defendants.

[*85] * (1) Vide *Holt v. Alloway*, post, this term, and note.

(2) Vide *Stout v. Wood*, Vol. 1 of these Rep. 71; *Elliott v. Ray*, ante p. 31, and note (2). An action of debt was brought in New York on the judgment of a justice in Vermont. The declaration averred that the judgment had been rendered on, &c. at, &c. in Vermont, by J. P., one of the justices of the peace within and for the county of Bennington, then and still being such justice and having full power and competent jurisdiction in said cause, by the confession of the defendant; and that the justice rendered judgment in favor of the plaintiff for 171 dollars debt or damages, with costs, &c. Demurrer to the declaration and judgment for the defendant. The Court said, that the declaration was defective in not setting out facts sufficient to give jurisdiction to the justice; that the statute giving jurisdiction to the justice ought to have been pleaded; and that the general averment of jurisdiction was not enough. *Sheldon v. Hopkins*, 7 Wend. 435. Vide also *Thomas v. Robinson*, 3 Id. 267; *Cleveland v. Rogers*, 6 Id. 438.

SACKETT v. WILSON, Executrix.

DECEDENT'S ESTATE—CLAIMS—PLEADING.—An account, commencing "A. B. debtor to C. D.," and then setting out the items, dates, sums, &c.—was filed in the Circuit Court upon the application of an executor, under the statute of 1824: *Held*, that the account was sufficiently particular.

ABATEMENT—MARRIAGE OF DEFENDANT.—If a feme sole marry, pending a suit against her, the suit does not abate; but the plaintiff may proceed against her alone, without noticing the marriage.

ERROR to the Marion Circuit Court.

BLACKFORD, J.—The plaintiff had an account against the estate of Wilson, of which estate the defendant was

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executrix. In conformity to the statute, the executrix in January, 1825, required the plaintiff to file his account in the Circuit Court for examination. The plaintiff, accordingly, in February following, filed a copy of his account in the clerk's office. At the following term in April, and at the subsequent terms until the reduction of the judgment in October, 1826, the parties regularly appeared in the suit. The plaintiff, at one of those terms, to-wit, that of April, 1826, suggested of record the marriage of the defendant pending the suit, which was admitted; and at the term of October, 1826, he again suggested the marriage, and moved for an order of the Court, making the husband a party to the suit. Upon the motion for an order to make the husband a [*86] party being overruled, the plaintiff offered *to prove his account, but the Court refused to permit him to do so, and dismissed the cause.

To support the judgment of the Circuit Court, the defendant contends, first, that the account filed was insufficient to enable him to plead; secondly, that the plaintiff was proceeding against a feme covert, without having made the husband a party.

This appears to be a plain case. As to the first point, we think the account filed is sufficiently particular to come within the provisions of the statute. It commences as follows: Isaac Wilson debtor to Letus Sackett. It sets out the items of the account particularly, with the dates, sums, &c. The statute requires no more (1).

There is nothing in the second point. The Court correctly overruled the motion, to make the husband a party: that could only be done by scire facias. But the plaintiff was not obliged to proceed against the husband. Upon the failure of his motion to make the husband a party, he offered to proceed in the cause against the defendant alone. This we conceive he had a right to do. The marriage of the defendant did not in any respect affect her liability. At the commencement of the action,

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she was a feme sole; and she could not, by taking a husband, abate the suit, or prevent its progressing against her alone. 1 Chitt. Pl. 45; Hamm. on Part. 227 (2).

The Circuit Court, therefore, committed an error in dismissing the suit.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

Wick, for the plaintiff.

Fletcher and Brown, for the defendant.

(1) R. C. 1824, pp. 318, 319. Stat. 1833, pp. 113, 114.

(2) If a feme sole, during the pendency of a suit instituted by or against her, marry, the action does not for that cause abate, but, upon the suggestion on record of the marriage with the name of the husband, the suit proceeds against or in favor of the husband and wife, and is determined in the same manner as if the marriage had taken place before the commencement of the suit. Stat. 1826, p. 53. Acc. R. C. 1831, p. 410.

[*87] *MITCHELL and Others v. MERRILL.

BOND—CONDITION—DEMAND.—In an action on a penal bond, conditioned for the delivery of property at a certain time and place, the declaration need not aver a demand of the property at the place. *Aliter*, if the condition be for the payment of money.

SAME—TENDER OF PERFORMANCE.—A tender and refusal of the property (or that which is equivalent) at the time and place fixed by the contract for its delivery, vests the property in the creditor; and puts an end to his right to sue upon the contract (a).

TENDER—TIME—HOW.—The plea of tender in such a case, need not state that the defendant was afterwards ready, or that he brings the property into Court.

ERROR to the Harrison Circuit Court.—In this action Merrill was the plaintiff below, and Mitchell, Holcroft, and Heth, were the defendants.

BLACKFORD, J.—This was an action of covenant, founded on a writing obligatory to the following effect: The obligors bound themselves to the plaintiff in the penal sum

(a) 18 Ind. 365.

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of 197 dollars, conditioned for the delivery of certain horses, to the sheriff of Harrison county, on a certain day, at the house of Jordan Vigus, in Corydon. The plaintiff avers in his declaration that the defendants have not performed their covenant nor has either of them; that the horses became due at the time specified in the obligation, are still due, and not delivered to the plaintiff, nor to the sheriff, as aforesaid, contrary to the covenant; that the defendants, though often requested, have not, nor has either of them, before, at the time, or since, the horses became deliverable, delivered the same or any of them to the plaintiff, nor to the sheriff, nor to any person for them or for either of them; but that they have hitherto wholly neglected and refused, and still do neglect and refuse so to do. To the damage of the plaintiff 300 dollars. The defendants cravedoyer of the writing obligatory, and demurred generally to the declaration. The Circuit Court decided in favor of the plaintiff.

The objection made to the declaration, is, that it contains no averment of a demand of the horses, at the place specified for their delivery by the condition of the bond. To show the deficiency of the declaration in this respect, the plaintiffs in error have referred us to *Sanderson v. Bowes*, 14 East, 500; *Rowe v. Young*, 2 Brod. and Bingh. 165; and to the cases of *Gilly v. Springer*, and *Palmer v. Hughes*, in this Court. The first [*88] *and two last cases mentioned, were actions on promissory notes for the payment of money; the other was on an acceptance of a bill of exchange: all payable at a particular place. They are not, as we conceive, applicable to the cause we are considering. This action is founded on a bond with a penalty, conditioned for the delivery of property at a certain time and place. In *Sanderson v. Bowes*, and *Rowe v. Young*, the Courts take particular care, to distinguish the cases of debt upon penal bonds, from those they were examining; and expressly admit that, in the former, no special demand was

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necessary to be averred. They say, that a compliance with the condition of the bond, to avoid the penalty, or whatever is equivalent to a compliance, is matter of defence, and must be pleaded. It is true, that the case before us is not an action of debt, but of covenant, and it may be thought that that makes a difference. Whether it does or not, would be a proper subject of inquiry, if this were a bond conditioned for the payment of money; but as it is not, that point needs not to be considered. There is another ground, independently of this being a bond with a condition, upon which this case is distinguishable from those referred to. It is this: Here the obligation is for the delivery of property, there the contracts were for the payment of money. This, we are of opinion, creates a wide difference between the cases. No cause ever underwent a more careful examination than that of *Rowe v. Young*. The twelve judges of England all delivered their opinions, the most of them at great length; so did Lords Eldon and Redesdale. The great question in the House of Lords was, whether the plaintiff should, in his declaration, aver a demand at the place; or whether it should be left to the defendant, to plead a tender at the place, or something equivalent, and bring the money into Court. That the defendant should not be driven to plead, was the final decision of the Court, upon this strong ground, that the plea of tender requires *the bringing of the money into Court*; and, therefore, if the defendant be compelled to plead, he must transport his money to the Court, however distant, though he may have always had it ready at the place where, and where only, he had promised to pay it. That was the consideration which settled the case of *Rowe v. Young*, making the averment of a demand at the place necessary, [*89] in actions on notes and acceptances for *the payment of money, and that was the consideration which produced the decisions of this Court, in *Gilly v. Springer*, and *Palmer v. Hughes*, (1).

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The case we are now considering, is, as has been already observed, of a character altogether different from those which have been mentioned. It is founded on a contract *for the delivery of property*, not for the payment of money. In this case, a tender and refusal of the property at the time and place fixed upon for the delivery, or the defendant's being at the time and place with the property ready to deliver it, and the plaintiff's not attending, nor any person for him, to receive it—constitute a complete plea in bar of the action, without the averment of a readiness at any time afterwards to deliver it, or of a bringing of it into Court. By the tender and refusal, or that which is equivalent, the property becomes vested in the creditor, and his right to sue upon the contract is at an end. *Slingerland v. Morse*, 8 Johns. R. 474. The consequence of this doctrine is clear:—The being afterwards ready, or the bringing of the property into Court, not being essential to the plea of tender, in a case of this kind, the foundation of the decisions referred to, requiring the averment of a demand in the declaration, instead of leaving the defendant to his plea, fails entirely in the present case. Here, the obligors bound themselves for the delivery of the horses, at the house of Jordan Vigus, in Corydon, on a certain day. It was not material to them, whether the obligee attended or not: their duty was to be at the place, on the day, ready to deliver the property. If they neglected thus to attend, and did not comply with their obligation, they failed in their contract, and are liable to an action. A demand by the obligee was not a precedent condition. It formed no part of the consideration of the bond. The obligors could have complied with their contract, and they were bound to do so, whether the obligee, or any person for him, attended or not. Had the defendants been ready, at the time and place, to deliver, and found no person there to receive—they could, in this action against them, have pleaded that fact in bar, with as

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much effect, and with as little inconvenience, as they could an actual delivery, if there had been one.

From these considerations, we are of opinion that the declaration in this case is sufficient, without the [*90] averment of a *demand at the particular place; and that the judgment of the Circuit Court, therefore, overruling the demurrer was correct.

Per Curiam.—The judgment is affirmed, with 1 *per cent.* damages and costs.

Nelson, for the plaintiffs.

Payne, for the defendant.

(1) "If a note be made payable at a banker's, or other place, in the *body* of it, a presentment at that place must be averred and proved. *Sanderson v. Boves and others*, 14 East, 500; *Roche v. Campbell*, 3 Campb. 247. But if the place of payment is merely *subscribed* at the *foot* of the note, it is no part of it, and must not be inserted in the declaration. *Exon v. Russell*, 4 M. & S. 505; *Williams v. Waring*, 10 B. & C. 2. But see *Trecothick v. Edwin*, 1 Stark. Rep. 468; where the whole of the note being *printed*, except the names, date, and sum, and a place of payment at the bottom of the note being also printed, it was holden that a special presentment there was necessary. The 1 and 2 Geo. 4, c. 78, does not extend to promissory notes." *Hennell on Forms, &c.*, 112, n (5). See *Palmer et ux. v. Hughes*, Vol. 1 of these Rep. 228, and note (2).

BOOKER v. BOWLES.

EVIDENCE—SECONDARY—WITNESS TO EXECUTION OF BOND.—One of two subscribing witnesses to a bond, being called to prove its execution, denied his signature: *Held*, that the other, if he could be procured, should be examined; but if he could not be found, secondary evidence might be resorted to (a).

SAME.—If a subscribing witness deny his signature, the case stands in the same situation as if his name were not on the instrument.

APPEAL from the Sullivan Circuit Court. Bowles was the plaintiff below, and Booker the defendant.

SCOTT, J.—Debt on bond. Defendant produced a counter bond to which there were two subscribing witnesses, one of whom denied his signature, and the other did not

(a) 3 Blkf. 450.

attend. Defendant then offered to prove the execution of the bond by other evidence, which was rejected by the Court. There was a verdict and judgment for the plaintiff.

The rejection of the evidence offered by the defendant, and the refusal of the Court to grant a new trial on that ground, are the only special errors assigned. This case can not be distinguished in principle, from one in which no subscribing witness appears. When the witness who was called denied his signature, the case stood in the same situation as if his name was not on the bond (1); [*91] and before the defendant could introduce *testimony of an inferior grade, it was his duty to use the same diligence to procure the attendance of the other subscribing witness, as if there had been, originally, but one witness to the bond; and the witness failing to attend, after such diligence used, he might have proved the execution of the bond by secondary evidence (2). This position is in conformity with the general rule, that the best evidence of which the nature of the case will admit must be produced. The cases of *Cunliffe v. Sefton*, 2 East. 183, and *Barnes v. Trompowsky*, 7 T. R. 261, are directly in point. We think, therefore, the evidence was correctly rejected, and that the refusal to grant a new trial was no error.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

Tabbs, for the appellant.

Judah, for the appellee.

(1) As to where the writing is considered to stand as if the subscribing witness's name were not on it, vide note to *Jones v. Coopridger*, Vol. 1, of these Rep. 47. In the case of *Swire v. Bell*, there cited, it is decided that if a witness be interested, at the time of attestation, the instrument stands as if it had never been attested. There is a case, however, in which it is held that if the party knowing the witness to be interested, request him to attest the instrument, he cannot afterwards object to him as incompetent. *Honeywood v. Peacock*, 3 Campb. 196. In a late case relative to the question of a witness's incompetency, who had become interested after the attestation, BEST, C. J., observes: This is an action upon a charty-party. After the execution of the instrument, the attesting witness was, by agreement with the plaintiff, admitted to a share of the profits which the plaintiff expected to derive from his bargain. An objection was taken to the compe-

tency of the witness, and his evidence was rejected. It was then proposed to prove his hand-writing: this proof was objected to and the objection allowed. The Court are of opinion that this evidence was properly rejected. There are many cases where a subscribing witness has acquired an interest *after* the execution of the instrument attested by him in which it has been decided that the proof of his hand-writing may be received to establish such instrument.

The hand-writing of a subscribing witness who has been appointed an executor or administrator [*Godfrey v. Norris*, 1 Strange, 34; *Cunliffe v. Sefton*, 2 East, 183,] or has married the person to whom the instrument was given [*Buckley v. Smith*, 2 Esp. R. 697,] has been allowed to be proved. We do not dispute the authority of any of those decisions; on the contrary, we should be disposed to extend the principle established by them to the case of a man entering into a partnership, and becoming interested in instruments by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member. Necessity requires that, in all these cases, such evidence should be received, as otherwise parties must lose the rights secured by the instruments attested, or forego accepting of situations most important to their welfare. It would be a hard thing, if the law were to say that a man should not become an [*92] executor or an administrator, or accept a beneficial *partnership, without giving up debts due to the estates in which he has acquired an interest. But, in the present case, the witness has only obtained an interest in the contract which he was to prove, and that interest he derived immediately from the plaintiff, who proposed to call him: the plaintiff can not complain that his witness is disqualified, when he himself has been the cause of his disqualification. The case of *Forrester v. Pigou*, 1 M. & S. 9, is stronger than the present. The plaintiff in that case gave the witness an interest after the cause of action accrued, without the privity of the defendant, and yet the Court would not allow the defendant to call him. *Hovill v. Stephenson*, 5 Bing. 493.

If the witness subscribe his name without the knowledge or consent of the parties, the instrument must be proved as if his name were not there. *McCraw v. Gentry*, 3 Campb. 232. So, if the name of a fictitious person be subscribed as a witness. *Fassett v. Brown, Peake*, 23.

(2) When the instrument stands as if the witness's name were not on it it may be proved by some person who knows the party's hand-writing, or who was present at the time of execution.

The circumstance of the witness being dead, absent from the country, having become blind, &c., does not place the instrument on the same footing with one having no subscribing witness. In such cases resort is not had to a person acquainted with the party's hand-writing, or who saw him execute the instrument; but it is the hand-writing of the witness that is then to be proved.

In the note to *Jones v. Coopridge*, referred to in the above note, a question suggested, whether proof of the signature of the subscribing witness, when admissible, is *prima facie* sufficient, without proof of the signature of the party, or other evidence of his identity. The doubt was raised, in consequence of the following remarks of BAYLEY, J: "It is laid down in Mr. Phillips' Treatise on the Law of Evidence, that proof of the hand-writing of the attesting witness is in all cases sufficient. I always felt this difficulty, that that proof alone does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove, not merely that the instrument was executed, but the identity of the person so executing it; but the proof of the hand-writing of the attesting witness establishes merely, that some person assuming the name which the instrument purports to bear, executed it; and it does not go to establish the identity of

that person, and in that respect the proof seems to me defective." *Nelson v. Whittall*, 1 B. & A. 21.

Since that opinion, expressed by BAYLEY, J., in 1817, the subject has been mentioned in the English Courts. In a case, in 1827, an agreement was offered in evidence on proof of the hand-writing of the subscribing witness who was dead. It was objected that this was insufficient, without proof of the defendant's hand-writing, or some proof that he was the party whose signature the witness had attested; and for this was cited the above-mentioned opinion of BAYLEY, J. But TENDERDEN, C. J., said, that the practice had been otherwise; that he had frequently admitted such evidence; and that he should continue to do so until his opinion was corrected. *Page v. Mann*, 1 Moody & Malkin, 79.

In a case, in 1828, a power of attorney was offered in evidence on proof of the hand-writing of the subscribing witness who was dead. This was objected to, and the above-named opinion of BAYLEY, J., was cited. BEST, C. J.—"I have a great respect for the opinion of my brother BAYLEY, but I think I am bound in such a case to act as my predecessors have done. It has been the uniform practice only to prove the hand-writing of the attesting witness, and I am of opinion that it is the most convenient [*93] *course. I consider that mode as most desirable which tends to diminish the number of witnesses." *Kay v. Brookman*, 3 Carr & Payne, 555.

There is another case, in 1828, in which a bond signed only by the defendant's mark, was offered in evidence. The subscribing witness had been subsequently appointed an executor of the obligee, and was now the plaintiff in the suit. The witness's hand-writing was proved, and some slight evidence given of the party's identity. The defendant objected to the admission of the bond in evidence. TENTERDEN, C. J.—There is some evidence here beyond the mere proof of the attesting witness's signature. But if there were no other, I should have no doubt of its sufficiency. If the objection were to prevail, it would often be impossible for the obligee of a bond to recover, when the subscribing witness was dead, and the obligor a marksman. *Mitchell, Ex'or, v. Johnson*, 1 Moody & Malk. 176.

In ejectment, in 1829, a lease purporting to have been signed by the mark of the party was offered in evidence. The proof was, the hand-writing of the subscribing witness and that he had gone abroad; and that the defendant had spoken of the term which he had under the lease. On this proof TENTERDEN, C. J., permitted the lease to be read. *Doe v. Paul*, 3 Carr & Payne, 613.

In the note of *Jones v. Coopridger*, some of the cases are cited in which proof of the witness's hand-writing had been admitted on account of his absence. In one of these cases, *Crosdy v. Percy*, the proof was admitted when diligent inquiry for the witness had been made at his usual place of abode, and information received that he had absconded to avoid his creditors. But a different doctrine has been since held. Affidavits were introduced to show that the witness could not be found at his office where inquiries had been made for him; and that the report was, that he was keeping out of the way to avoid his creditors. PARK, J.—The general rule applicable to cases of this description must be strictly followed, viz: that an attesting witness must be called to prove the execution of a deed, or his absence must be well accounted for. Formerly proof of the hand-writing of an attesting witness was only admissible where such witness was dead; and I can remember the first deviation from that rule, where it was extended to cases where the party was abroad, or out of the jurisdiction of the Courts of this country; but I have never known an instance where his testimony has been dispensed with, to prove the execution of a deed, on an affidavit which merely stated, that it was believed he kept out of the way in order to avoid an arrest. But it has been contended, that proof of his hand-writing was admissible, if he kept out of the way at the instance of

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the defendant in the suit. It is manifest, however, on the face of the affidavits, that if he kept out of the way, it was on account of his own pecuniary distress and difficulties. BURROUGH, J.—It is quite clear that an attesting witness must be called to prove the execution of a deed, unless he be out of the jurisdiction of the Court or kept out of the way at the instance of the defendant, or party charged in the suit. *Pytt v. Griffith*, 6 J. B. Moore, 538.

Evidence was offered of the subscribing witness's hand-writing, upon proof of his being dangerously ill, but it was rejected. ELLENBOROUGH, C. J.—I cannot dispense with the attendance of a witness who is still alive and within the jurisdiction of the Court, so as to admit evidence of his hand-writing in the same manner as if he were actually dead. No case has yet gone so far, and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hope of cure. If such a relaxation of the rules of evidence were permitted, there would be very sudden indispositions and recoveries. When a witness is taken ill, the party who would avail himself of his testimony, must move to put off the trial. If he be in a very dangerous condition, he will probably be dead before the ensuing sittings, and then evidence of his hand-writing may be received without any risk of collusion. *Harrison v. Blades*, 3 Campb. 457.

[*94] *In the note above referred to, several cases are cited to show, that where a party producing a deed, under a notice to produce, claims under it a beneficial interest, the party calling for the deed need not prove its execution. Since that note was written, the following cases have been decided. In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it: *Held*, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease. *Burnett v. Lynch*, 5 Barn. & Cress. 589. In ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises, to prevent the defendants from setting it up to defeat the action: *Held*, that this was a recognition of the lease as a valid instrument, and that when produced in pursuance of notice from the defendants, it might be read in evidence without proof of execution. *Doe v. Hemming*, 6 Barn. & Cress. 28.

JAMISON v. HENDRICKS.

TROVER—DEMAND.—A horse which was the property of A. was purchased by B. at a sheriff's sale on an execution against C. After B. had sufficient reason for believing the horse to be A's property, he exercised acts of ownership over him, and made use of evasive measures to prevent A. from obtaining him. *Held*, that A. might recover in trover for the horse against B., without proving a demand and refusal.

SAME—SHERIFF—If the sheriff take and sell the property of A. on an execution against B. he is liable to the owner, in trespass or trover, without demand.

SAME—DAMAGES.—The plaintiff may recover, in trover, for the injury done to his goods, as well as for their value.

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APPEAL from the Marion Circuit Court.—Hendricks brought an action of trover against Jamison for a horse. Plea, not guilty. Verdict and judgment for the plaintiff below.

HOLMAN, J.—Trover for a horse. The substance of the evidence, as set forth in a bill of exceptions, was that Hendricks lent the horse to Davis, in Marion county, to ride to Corydon. The horse was taken, in execution, at Corydon, as the property of Davis, and sold, and Jamison became the purchaser. At the time of the levy, Davis proclaimed that the horse was not his, but belonged to Hendricks. Before the commencement of this suit, Jamison told one of the witnesses, that, when Hendricks came in search of his horse, he was out at grass. After the commencement of the suit, Davis observed to Jamison, that he did not pity him, for he told him before, that the horse was the property of Hendricks. One of the witnesses stated that the horse was worth 30 dollars. [*95] The horse was purchased by *Jamison in 1822; this action was commenced in 1825; and the trial was had in October, 1826.

The defendant moved the Court to instruct the jury, that it was necessary for the plaintiff to prove a tortious conversion, or a demand and refusal of the horse. The Court gave that instruction. The defendant further requested the Court to instruct the jury, that to prove a conversion in this case, it was necessary to prove a demand of the horse and a refusal to deliver him up; but the Court instructed the jury that the using the horse as his own by the defendant, or exercising acts of ownership over him, was a conversion of the property. The jury found a verdict for the plaintiff for 61 dollars. The defendant moved for a new trial, which was refused by the Court.

The point most relied on in this case, arises out of the instruction of the Court, that proof of a demand and refusal was unnecessary. This instruction of the Court is

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to be taken in connection with the whole case, as it stood before the jury. The officer, on an execution against Davis, had taken the property of Hendricks, notwithstanding the proclamation of Davis that the property was not his, and was liable to the action of Hendricks, either of trespass or trover, without a demand. Jamison before he purchased the horse was notified by Davis that the horse belonged to Hendricks. This notice, it is true, did not come from a source in which Jamison was bound to place full confidence; yet it was sufficient to put him upon his guard; and to induce him to take care what he was purchasing. This, taken in connection with the statement of Jamison, when Hendricks came for his horse, and was prevented, by some evasion, from seeing or getting possession of him, he being kept out of the way, that the horse was "out at grass," presents a chain of circumstances, sufficient to warrant this action without a regular demand and refusal; inasmuch as they show that Jamison must have been exercising acts of ownership over the horse, after he had sufficient reason to believe that he was the property of Hendricks; and made use of evasive measures to prevent Hendricks from obtaining him. In the case of *Baldwin v. Cole*, 6 Mod. 212, it is said that the denial of goods to him who has a right to demand them is an actual conversion. And in the case of *La Place v. Aupoix*, 1 Johns. Cas. 406, the defendant's admission, that he had the plaintiff's goods, [*96] and that they were *lost, was held to be evidence of a conversion without proof of a demand and refusal. See also 3 Stark. Ev. 1496, and various other authorities there cited; which lead to the conclusion that the jury in this case, were authorized to find that the defendant had converted the horse to his own use.

The damages given by the jury are perhaps more than in strict justice ought to have been given; but as the defendant had been about four years in possession of the horse, and as the plaintiff is entitled to recover for the

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injury done to his goods, as well as for their value, (1 Stark. Ev. 199, in note, and the case there cited,)—we are not prepared to say, that the damages are so conclusively excessive, that the Circuit Court, in the exercise of a sound legal discretion, was bound to grant a new trial on that account.

Per Curiam.—The judgment is affirmed, with 1 *per cent.* damages and costs.

Nelson, for the appellant.

Fletcher, for the appellee.

DURHAM v. MUSSELMAN.

TRESPASS—MALICE—PROBABLE CAUSE.—A declaration contained two counts. The 1st stated that the defendant, on his unenclosed land in the county, cut a tree so that it was nearly ready to fall, and set it on fire; and that the tree afterwards fell upon and killed the plaintiff's horse. The 2d count stated, that the defendant, knowing the plaintiff's horse to be running at large in the unenclosed lands of the county, and maliciously contriving to injure the plaintiff, unlawfully and negligently cut a tree in the county and set it on fire; and that the tree afterwards, in consequence of the cutting and burning, fell upon and killed the plaintiff's horse (*a*).

Held, that the declaration contained no cause of action.

ERROR to the Johnson Circuit Court.

HOLMAN, J.—Durham, in his declaration against Musselman, charges in the first count that Musselman, on his unenclosed land in Johnson county, cut a large tree so that it was nearly ready, and always liable to fall, and then built a fire around it, and negligently and unlawfully left it burning, and always liable to fall; which tree afterwards, on the same day, fell upon and killed the mare and colt of the plaintiff. In the second count, he states [*97] that his mare and colt were running at large *in the unenclosed lands in Johnson county, and that

(a) 53 Ind. 527; 16 *Id.* 312-314; 23 *Id.* 69; 27 *Id.* 96.

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the defendant knowing the same, but contriving maliciously to injure the plaintiff, unlawfully, carelessly, and negligently, cut a large tree in Johnson county, and then built a fire around said tree, and left the same always liable to fall; which tree, by the said cutting and burning, afterwards, on the same day, fell upon and killed the said mare and colt. To this declaration the defendant demurred and had judgment.

This case seems to rest in some measure upon the peculiar customs of this country. It is well known, that horses and cattle are permitted to run at large through the country, and particularly in the new settlements, in one of which this transaction took place; and are not considered as trespassing by entering the unenclosed lands of any person. So that the defendant can not resist this action, on the ground that the mare and colt of the plaintiff were trespassing on his lands when they were killed. Nor can the defendant sustain his defence, even on the first count in the declaration, on his supposed natural right of doing what he pleases on his own land; for a man should so use his own property as not to injure the property of another. But this principle of common justice does not render a man liable, as a matter of course, for every injury another may sustain from his use of his own property. It is only when he deviates, either by intention or neglect, from the ordinary use of his property, that he can be considered liable for an injury thereby done to another. Even then, his liability depends on the nature of his act, and the probability that such an act would occasion an injury to another. If the act was unlawful, as laying a log in the highway, he would be liable for an injury done thereby, without any reference to the probability that it would occasion that particular injury. But when the act is lawful, the liability of the actor, for an injury occasioned by it, depends, in the first place, on the question, whether the injury is the natural or probable consequence of the act, or is merely accidental. If

the injury is the natural or probable consequence of the act, and such as any prudent man must have foreseen, it is but reasonable that the perpetrator of the act, should be held accountable for the injurious consequences. As, in the case of the man baiting his traps with flesh so near the highway, or the grounds of another, that dogs [*98] passing the *highway, or kept in another's grounds, are attracted into his traps, and thereby injured; he is liable for the injury. *Townsend v. Wathen*, 9 East, 277. In the second place, when the injury is accidental, the liability of the actor must depend on the degree of probability there was, that such an event would be produced by the act.

Testing this case, as it stands in the first count, by these rules, it is evident that the cutting or burning down of a tree, on a man's own land, whether enclosed or otherwise, is not an unlawful act. The charge in the declaration that it was unlawfully done, amounts to nothing, where there are no circumstances to warrant such a charge. In removing the heavy forests with which our lands are covered, we see it to be a very general practice, to girdle the trees, and leave them to die and fall according to the course of nature. If the trees so girdled fall upon the cattle of others, running at large, the person who girdled the trees is not liable for the injury. Every person suffering his cattle to run at large through the forest, must be considered as running the risk of their being killed by the trees so girdled. Another method used for the destruction of timber, is to employ fire for the removing of such trees as are susceptible of being felled by burning. This practice, though not so common as the former, and perhaps more dangerous, is by no means unlawful. The destruction of the cattle of others, is not the natural or probable consequence of such a practice. If cattle are thereby destroyed, it can only be considered as accidental; and the circumstances of the case would determine what degree of probability there was that such would be the

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consequence. The simple act of leaving a tree on fire, which must of necessity burn down in a short time, and which, in its fall killed the plaintiff's mare and colt, is not such an act, under the existing state of things in this country, as would render the actor liable to the injured person. So that under the first count in the declaration, the plaintiff can not maintain his action.

The second count presents the case a little differently. It does not state that the tree was on the lands of the defendant, but in Johnson county; but as it is not suggested in the declaration, nor pretended in argument, that the defendant had done any wrong as it re-
[*99] spected the tree itself, or was infringing the *right of any person by molesting the tree, this difference in the two counts can make no difference in the defendant's liability. But this count states that the defendant, contriving maliciously to injure the plaintiff, cut the tree and set it on fire; but this can not materially alter the case. The averment of malice has no connection with the injury of which the plaintiff complains. Had the injury been the natural or probable consequence of the act, a malicious design might have been connected with it. But to connect a malicious design to injure, with the burning of a tree in Johnson county, because the defendant knew that the plaintiff had a mare and colt running at large in Johnson county, seems to be forced and unnatural. We can not have a definite idea of a design to injure, unconnected with some degree of probability, that the means made use of would effect the design. Although the plaintiff's mare and colt were running at large in Johnson county, yet the probability of injuring either of them by burning down a tree in that county, is so very remote, that we can not connect it with the idea of design or contrivance. Many thousands of trees might have been left to burn down in that county, on the same day, without injuring the plaintiff's mare or colt. In order to have given materiality to the charge

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of malice, the declaration should have shown, that there was some degree of probability, that the burning down of the tree would have done the plaintiff an injury; as, that the tree stood near, and would probably fall where the defendant knew the plaintiff's mare and colt were usually, or frequently feeding, passing, or standing; and then the materiality of the charge of malice would depend on the degree of probability. Without showing some such probability of doing an injury, the charge of malice amounts to nothing. So that the action can not be supported on either count in the declaration.

Per Curiam —The judgment is affirmed with costs.

Sweetser, for the plaintiff.

Wick, for the defendant.

[*100]

*GILLY v. BRECKENRIDGE.

ATTACHMENT—FILING CLAIMS—PLEADING.—When a creditor comes in, during the pendency of an attachment commenced by another, to obtain a judgment under the statute, his claim must be set forth with the same certainty that, in any other action, is required in a declaration.

ERROR to the Knox Circuit Court.

SCOTT, J.—Arthur Patterson brought suit, by foreign attachment, against John B. Gilly, and proceeded to final judgment. During the progress of the suit, and at the term of the Court at which final judgment was rendered, James D. Breckenridge filed the following suggestion and claim, to wit, “James D. Breckenridge suggests, and gives the Court now here to understand and be informed, that he is one of the creditors of the said John B. Gilly, the defendant in attachment, to the amount and for the sum of 4,214 dollars and 78 cents; and he prays a dividend in the property attached, in proportion to the amount of his demand or claim, first deducting all legal costs from the amount which the property attached may

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bring, according to the statute of the state of Indiana, in such case made and provided. June 23rd, 1826.—James D. Breckenridge.” The plaintiff by his counsel objected to this claim, but the Court overruled the objection. A jury was impaneled, and there was a verdict for the whole amount of the claim, and judgment accordingly. To reverse that judgment is the object of the present writ of error.

It is essential to a good declaration, in all the forms of action known to the common law, that it contain a good cause of action, set forth with such certainty of persons, time, place, and matter, as to be distinguishable from any other demand of the same nature. The cause of action must be so specially described, that one recovery will bar any future attempt to enforce the same demand. It was decided by this Court, in the case of *Bond v. Patterson*, 1 Blackf. 34, that this certainty is as indispensable in cases of attachment as in any other form of action. In that case, the decision had respect particularly to the description of the demand set up by the plaintiff; but the doctrine is equally applicable to one who comes in as

[*101] a *claiming creditor, after the writ has been sued out by another; no reason exists, why the rules of law should be, in any degree, relaxed in his favor; or why he should be excused from showing his claim with the same descriptive certainty which would, in any other form of action, be required in a declaration. In the case before us, no contract is set out, no breach assigned, no time, place, or consideration, is shown; the mere suggestion that the claimant is *one of the creditors of Gilly*, to the amount of 4,214 dollars and 70 cents, is all the claim the record shows. Some depositions, and a long account purporting to be some transactions between these parties, are sent up with the record; but as these documents form no part of the record, we can not notice them. We are therefore of opinion that, for the vagueness and uncertainty of the claim, the objection made to it in the Cir-

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circuit Court ought to have been sustained, and that the Court erred in overruling that objection.

Per Curiam.—The judgment is reversed with costs

Judah, for the plaintiff.

Dewey, for the defendant.

ABORN v. BURNETT and Another.

VENDOR'S LIEN—DEED INTENDED AS MORTGAGE—ADMISSION.—A. filed a bill in chancery against B. the heir and C. the administrator of D.—stating that the complainant had sold and conveyed a lot of ground to D. without receiving the purchase-money, and that D. had died insolvent. Prayer that the lot might be sold to pay the purchase-money. An order of publication was made as to the heir, who was a non-resident. The administrator filed an answer and cross-bill—stating that the conveyance, though absolute on its face, was intended as a mortgage to secure the payment of a debt due from A. to D., and praying a sale of the lot to pay the debt.

Held, 1st, that there could be no decree for the complainant without proof that the order of publication, as to the heir, had been made. 2dly, that parol evidence of the complainant's admissions as to the deed's being intended to be a mortgage, should be received with great caution; and ought not, where there are circumstances raising a contrary presumption, to be permitted to control the deed (*a*).

ERROR to the Floyd Circuit Court.

SCOTT, J.—Abby B. Aborn filed her bill in chancery in the Floyd Circuit Court against Moses Eastburn, heir at law, and Alexander S. Burnett, administrator of [*102] John Eastburn, deceased, *stating that, in the year 1818, she sold and conveyed to the said John Eastburn a certain lot in the town of New Albany, for the sum of 800 dollars; that, at the time of the sale and conveyance so made, she received no part of the purchase-money for the said lot: but that, since that time, she has received 311 dollars and 20 cents. She sets out the death of Eastburn, alleges his estate to be insolvent, and prays

(*a*) 5 Blkf. 361; 19 Ind. 334; 22 *Id.* 59; 29 *Id.* 570.

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a sale of the lot, to satisfy and pay the amount of the purchase-money remaining due. Burnett, the administrator, in his answer and cross-bill, alleges that the conveyance stated by the complainant, although appearing on its face to be an absolute transfer of the property, was, by the intent and agreement of the parties, to stand only as a security for the payment of a certain debt, which he alleges was due from the said Aborn to the said Eastburn; and that, on payment of that debt, the contract was to be rescinded, or the lot reconveyed to the complainant. He admits the insolvency of Eastburn's estate, but resists the complainant's claim to a lien on the property. He charges the complainant with the amount received by her, and claims a foreclosure and sale of the mortgaged premises, for the payment of that debt. There was an order of publication with respect to the heir at law, who, it appears, is a non-resident. After several continuances, the Court, without any further notice being taken of the heir at law, rendered a decree in favor of Burnett, the administrator, and ordered a sale of the lot in conformity to the prayer of his cross-bill.

This was wrong. The Court ought to have been satisfied that the publication had been made, agreeably to their order, prior to the rendition of a decree which would affect the interest of the heir at law. This circumstance might be less important, if the decree were otherwise clear of objection. The decree is founded on parol evidence of the declarations of the complainant, in certain conversations with the witnesses, or in their hearing, unaided by any circumstance of fraud, mistake, or accident; a species of evidence extremely liable to be misunderstood or perverted, very difficult to be assailed, and at the same time so evanescent, that great caution ought to be used in admitting it to control an absolute deed. The cases where Courts have admitted parol evidence to interfere with written contracts, have generally been where

[*103] there existed some equity *dehors the deed. There

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is nothing in this record which goes to show any equitable circumstances dehors the deed, which would open the door to the admission of parol evidence. On the contrary, the case, as exhibited in the record, affords strong presumption against such evidence. We have not the deed before us, but it is stated to have been made in the year 1818; and the defendant alleges, that it was made to secure the payment of a debt then existing. When we examine the demand set up by the administrators, we find the first item of the account dated on the 3d of December of that year, and the account, at the close of the year, so small as to render it extremely improbable that either party would have thought of a mortgage to secure its discharge.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

Nelson, for the plaintiff.

Payne, for the defendant.

HOLFORD v. THE STATE.

RECEIVING STOLEN GOODS—VENUE—TIME.—Indictment for receiving stolen goods knowing them to be stolen. *Held*, that the time and place, when and where the goods were stolen, need not be stated in the indictment, nor proved at the trial (a).

ERROR to the Dearborn Circuit Court.

SCOTT, J.—Holford was indicted in the Dearborn Circuit Court for receiving stolen goods; on which indictment there was a verdict of conviction, and judgment. The errors assigned are, that the indictment does not allege any time and place when and where the goods were stolen; and that, on the trial, there was no evidence to prove that the said goods were stolen within the state of Indiana.

(a) 49 Ind. 248; 33 *Id.* 439.

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To test the validity of the errors assigned, it is necessary only to revert to the statute creating the offence. The words of the statute are as follows, to wit, "every person who shall buy or receive stolen goods, knowing the same to be stolen, shall upon conviction be punished,"

&c. R. C. 1824, p. 140. In an indictment, every [*104] material fact ought to be alleged with *the certainty of time and place; and every fact is material, which is necessary to constitute the crime charged in the indictment. That the goods mentioned were stolen goods, and that the defendant received them, knowing them to be such, were material facts to be alleged and proved; because they are the facts which constitute the offence; but the time and place of stealing the goods need not be alleged; because the defendant is not charged with the larceny. If it were necessary, by averment and proof, to connect the time and place of the stealing with the act of receiving, it would, for the same reason, be necessary also to connect the same circumstances with his knowledge of the fact, that the goods were stolen. If such were the law, no offender could be convicted, under this statute, without proof, not only of his having received stolen goods, knowing them to be such, but also of his knowledge of the precise time and place of the original larceny. And yet it is easy to conceive a case, in which a man might be guilty of the offence of knowingly receiving stolen goods, without either the offender, or the witnesses, having any knowledge of the time and place of the felonious taking. If these positions be correct, it clearly follows that any evidence which might have arisen in this case, going to show the time and place of the original larceny, was unnecessary to support the charge in the indictment.

Per Curiam.—The judgment is affirmed with costs.

Howard, for the plaintiff.

Whitcomb, for the state.

Stegars v. The State.

STEGARS v. THE STATE.

RECOGNIZANCE—SURRENDER OF PRINCIPAL—RELEASE.—The surety in a recognizance before a justice of the peace, for the principal's appearance at the Circuit Court to answer a criminal charge, can not discharge himself by a surrender of his principal to the justice (*a*).

SAME—PRACTICE.—The surrender in such cases, accompanied by a certified copy of the recognizance, may be made to the sheriff.

ERROR to the Rush Circuit Court.

HOLMAN, J.—Scire facias, on a recognizance stating that John Moore and William Stegars, on the 8th [*105] of February, 1827, *appeared before Daniel Lanman, a justice of the peace, and acknowledged themselves to owe to the state of Indiana 200 dollars each; to be levied, &c.; conditioned that said Moore should appear at the next Circuit Court and answer to a charge of perjury; that Moore failed to appear, and that Stegars, when required, failed to bring in his body in discharge of his recognizance; that thereupon judgment was entered up against Stegars, and a scire facias awarded against him to show cause why the state should not have execution on said judgment. The scire facias was returned "not found." Afterwards the defendant appeared by his counsel, obtained oyer of the recognizance and scire facias, and pleaded three several pleas in bar. These pleas are drawn out to a considerable length, but are in substance as follows:

First, that said Moore being surrendered by the defendant as his bail to a proper tribunal, and being in the custody of a proper officer, to wit, a constable, by virtue of said surrender, was brought before an associate judge in obedience to a writ of habeas corpus, by the constable, who made his return "without any papers to show why he was detained in the custody of the said Lanman:" and that the said judge ordered the said Moore to be dis-

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charged, who thereupon was discharged accordingly; averring that the said Moore so discharged, and the said Moore named in said recognizance, were the same person, and that there was no other charge against him but the charge in the recognizance. Secondly, that after entering into the recognizance, and before the recognizance was returned into court, he retook the said Moore as his bail, and afterwards, on the same day of the date of the recognizance, delivered him to the said justice, and into the custody of the acting constable of said justice; and that said Moore was then and there received by the said justice and constable in discharge of said recognizance, and to answer to the state for the said offence. Thirdly, that on the — day of —, 1827, he surrendered up the said Moore to the said justice, at his office, who had full authority to receive said Moore, and did receive him and commit him to the custody of a constable; averring that the surrender was made by the defendant, as the bail of the said Moore, in discharge of his recognizance.

[*106] *The attorney for the state demurred to these pleas; the demurrer was sustained by the Court, and execution awarded.

The plaintiff in error contends here, that he had a right to surrender his principal to the justice of the peace who took the recognizance, at any time before the recognizance was returned into Court. If he is correct in this position, and his right to make the surrender does not exist after the recognizance is returned into Court, his first and third pleas must fail; because they do not show the time when the surrender was made, nor that it was made while the recognizance remained with the justice of the peace; and more especially the first, because it does not state that the surrender was made to the justice of the peace, but to a *proper tribunal*. The second is therefore the only plea that requires our attention. This plea avers a surrender of the principal to the justice of the peace, on the day the recognizance was taken, and

before it was returned into Court. It becomes therefore necessary to inquire whether the bail had a right to make such a surrender. That he would have this right if we were governed by the English practice, seems to be conceded; but such a right does not seem to be consistent with our system of jurisprudence, nor does it appear to have been contemplated by our legislature. As a general rule it would be extremely inconvenient and dangerous. A justice of the peace in this state, is not considered as having a ministerial officer at all times attending upon him; and in the absence of his officer, he is unprepared to detain a prisoner, or to conduct him to prison. So that, independently of any act of the legislature, he would be an improper officer to receive the prisoner at any time the bail might think proper to surrender him. But the legislature has made ample provision, in all such cases, by authorizing sureties in criminal cases to surrender their principals to the sheriff, with a certified copy of the recognizance. R. C. 1824, p. 379 (1). This seems to be the only mode contemplated by the legislature, and the only mode that could be safely and conveniently pursued in this country. We therefore think that the right of surrendering the principal to the justice of the peace, even before the removal of the recognizance, does not exist.

But this plea further states, that the justice of the peace received the principal in discharge of the [*107] recognizance, and *committed him to the custody of the constable. If such a surrender was unauthorized by law, and the bail had no right to make it, the act of the justice of the peace could not affect the case. The act of assembly authorizing the justice of the peace to take the recognizance, R. C. 1824, p. 236, requires him to return the recognizance into the Circuit Court, or to transmit it to the prosecuting attorney, or clerk, at as early a time as is convenient before the sitting of the Court (2); and does not contemplate his doing any other

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act, relative to the prisoner, after taking the recognizance, besides making such return. There however can be no doubt but that while all the parties are yet before him, he might, at the request of the bail, cancel the recognizance, and proceed in the case as if no recognizance had been taken. But after he has disposed of the case, and dismissed the parties from before him, the only legal act that remains for him to do in the case is, to return the recognizance into Court. And the only way that the bail could then exonerate himself from his responsibility would be to surrender the principal to the sheriff. Had this method been pursued in this case, it is not probable that the prisoner would have been discharged, as is stated in the first plea; the officer having him in custody would have been able to show a good cause for detaining him. The result of the case before the associate judge, clearly shows the impolicy of pursuing any other method of surrender, than that prescribed by the act of assembly.

There are some other questions raised in this case, but they are without weight. There is nothing in the objection, that the recognizance was not signed by the recognizers. See 1 Chitt. C. L. 104. And the pretext for the objection, that the scire facias was not executed, was at an end as soon as the defendant appeared to the action.

Per Curiam.—The judgment is affirmed with costs.

Rariden and Sweetser, for the plaintiff.

Whitcomb, for the state.

(1) R. C. 1831, p. 197, sec. 92, accord.

(2) R. C. 1831, p. 293, accord.

[*108]

HOLT v. ALLOWAY.

FOREIGN JUDGMENT—RES ADJUDICATA.—The judgment of a Court of record of competent jurisdiction in one state, fairly obtained, where the defendant had personal notice of the suit, is conclusive between the parties

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in an action on it in any other state; and the circumstance, that the judgment is against the defendant as special bail, makes no difference.

SAME—DEFENCE.—To an action on the judgment of a Court in another state, the defendant may plead that the judgment was obtained by fraud, or that the court had no jurisdiction of the person or of the subject-matter.

SAME—JUDICIAL ACTION.—A judgment obtained conformably to the laws of the state against a person resident therein, without personal notice of the suit, is not conclusive against him in an action on it in another state; nor is such judgment absolutely void as the judgment of a court having no jurisdiction. The judgment in such case, stands on the same footing with a foreign judgment; and if it be against special bail, he may, in an action on it in another state, plead that no ca. sa. had issued against his principal (a).

ERROR to the Bartholomew Circuit Court.

BLACKFORD, J.—This was an action of debt, founded on the judgment of a Circuit Court of the state of Kentucky. The judgment is declared on as a matter of record, with a reference by the *prout patet per recordum*. The defendant pleaded, inter alia, that the judgment, if any, had been obtained against him on a recognizance of special bail for W. Alloway, without any notice having been served on the defendant; and without any *capias ad satisfaciendum* having been issued against the principal. There was a general demurrer to the plea, and judgment for the defendant.

This plea, though not technically drawn, may be considered as averring, in substance, that the defendant had no personal notice of the original suit; and the plaintiff contends, that, let the law be as it may in ordinary cases, as this was an action against special bail, no personal notice was necessary. For this he cites *Delano v. Jopling*, 1 Littell, 417. The opposite doctrine, however, is laid down in *Robinson v. The Executors of Ward*, 8 Johns. R. 86, relied on by the defendant. In the latter case it is decided, that the circumstance of the judgment having been obtained against the defendant as bail, should make no difference: and our opinion is in accordance with this

(a) 38 Ind. 429; 9 Id. 212; 2 Id. 548; 4 Blkf. 429.

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decision. The defence of bail may be as valid and important as that of a principal and whatever opportunity of making it may *be claimed for the one, may be also for the other. There being, therefore, nothing peculiar in this case to take it out of the general doctrine applicable to actions on the judgments of other states, it becomes necessary to examine what that doctrine is.

By the act of congress of 1790, passed in pursuance of a provision in the constitution of the United States, the judicial proceedings of each state, shall have the same faith and credit in the other states, that they have in the state whence they are taken. According to this act, we consider that the judgment of a Court of record of competent jurisdiction in one state, fairly obtained, where the defendant had personal notice of the action, is conclusive between the parties in any other state in which an action may be brought on it. In such a case, *nil debet* can not be pleaded, because that would lead to a re-examination of the merits of a cause, presumed to have been already fairly and fully tried; there, the record being conclusive, *nul tiel record* is the only general plea. *Mills v. Duryee*, 7 Cranch. 481. But if the Court rendering the judgment, have no jurisdiction of the parties, or of the subject-matter; or if the judgment be obtained by fraud; we are of opinion that the defendant is not to be confined to the single plea of *nul tiel record*, should an action be brought against him in another state on such a judgment. In these cases he must be permitted to plead the fraud, or the want of jurisdiction of the person, or of the cause, in bar of the suit. The common principles of justice seem to demand, that such should be the construction of the act of congress, and there is good authority for saying, that such a construction is in accordance with the principles of law. *Bissell v. Briggs*, 9 Mass. 462; *Borden v. Fitch*, 15 Johns. R. 121; *Andrews v. Montgomery*, 19 Johns. R. 162 (1).

The cause under consideration does not belong to either of those classes of cases. On the one hand, it is a case to which, for the want of personal notice, the act of congress giving to the judgment of one state, when sued upon in another, the same conclusive effect as it has where rendered, does not properly apply. That act is based upon the principle, that the merits of a cause once fairly and fully tried and determined in one state, should not be subject to the subsequent investigations and decisions of the Courts of other states; but a judgment rendered, like the one in question, in the absence of the defendant, and without any personal notice to him of the suit, can not be said to have been thus fairly obtained, and, consequently, does not come within the principle of the act of congress. On the other hand, although the defendant had no personal notice of the original suit, yet, as it does not appear but that he was a resident of the state of Kentucky when the action was commenced, and that the judgment was recovered in conformity with the laws of that state, we would not, it is conceived, be warranted in determining that the Court had no jurisdiction of the defendant, and that the judgment is a nullity. We are of opinion, therefore, that according to the facts on the record, the judgment in this case must be viewed, not as conclusive, for the want of personal notice; not as absolutely void, since the defendant must be presumed a resident of Kentucky when the suit was commenced, and amenable to its laws; but we must consider it as a foreign judgment, and *prima facie* evidence of the debt. It is *per se* a cause of action, and may be declared on, as in the present case, without setting forth the original demand. Its justice, however, is subject to be impeached; and it may be shown to have been unduly or irregularly obtained.

The defendant has here undertaken to impeach the justice of the judgment by showing in his plea, that it was rendered against him on a recognizance of special

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bail; that he had no personal notice of the suit; and that no *capias ad satisfaciendum* had ever issued against the principal. If these facts be true, and the demurrer admits them to be so, the plaintiff had no right to recover. No *capias ad satisfaciendum* having issued against the principal, the bail could have pleaded that fact in bar of the original action, if he had had an opportunity to do so. Such a plea, it is true, would have been too late, in a suit like the present, had this been a domestic judgment of record, or entitled, under the act of congress, to the conclusive effect of such a judgment. That not being the case, however, as appears by the record, but the judgment having the character and validity only of a foreign judgment, the justice of which might be impeached, the want of a *capias ad satisfaciendum* showing it to be unjust and that it had been unduly obtained, was a bar to the action.

[*111] *There is another point in this cause which it may be proper to mention. The declaration treats the judgment as conclusive under the act of congress; and the question suggested is, whether the defendant for that reason was bound, in pleading, to consider it in any other light. If he was not, the plea of a want of personal notice was of itself sufficient. This subject, however, need not be examined, for, assuming that the judgment, though not so described, may be considered as a foreign one, the defendant has even in that case, as we have already observed, made out a good defence.

Per Curiam.—The judgment is affirmed with costs.

Wick, for the plaintiff.

Sweetser, for the defendant.

(1) Vide note (1) to *Cole v. Driskell*, Vol. 1, of these Rep. 16. Chancellor KENT, after referring to most of the authorities on this subject, says: The doctrine in *Mills v. Duryee* [7 Cranch, 431,] is to be taken with the qualification, that in all instances the jurisdiction of the Court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the Court had no jurisdiction over his person. It is only when the jurisdiction of the Court in another state is not impeached, either as to the subject-matter or the person, that the record of the judg-

ment is entitled to full faith and credit; and if the suit in another state was commenced by the attachment of property, the defendant may plead in bar that no process was served on him, and that he never appeared either in person or by attorney. *Starbuck v. Murray*, 5 Wend. 148. A special plea in bar of a suit on judgment in another state to be valid, must deny, by positive averments, every fact which would go to show that the Court in another state had jurisdiction of the person, or of the subject-matter. *Harrod v. Barretto*, 1 Hall's N. Y. Rep. 165; 1 Kent's Comm. 2d ed. pp. 260, 261.

The most important cases on the subject, not cited in the note to *Cole v. Driskell*, are *Thurber v. Blackbourne*, 1 N. H. Rep. 242; *Spencer v. Brockway*, 1 Ohio Rep. 259; *Aldrich v. Kinney*, 4 Conn. Rep. 380; *Benton v. Burgot*, 10 Serg. & Rawle, 240; *Hall v. Williams*, 6 Pick. 232; *Newell v. Newton*, 10 Pick. 470, 472; *Harrod v. Borretto*, 1 Hall, 155; *Clarke's Admr. v. Day*, 2 Leigh, 172; *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Wend. 447.

The case of *Shumway v. Stillman*, supra, had been previously before the Court. It was instituted in New York on a judgment obtained in Massachusetts. The plea in the first instance was, that at the time when the suit was commenced, and from that time till the rendition of the judgment, the defendant resided in New York. This plea not showing but that the defendant had been served with process or had appeared to the action, was held on demurrer to be insufficient. 4 Cowen, 292. The defendant, in the second instance, pleaded, that at the time of the commencement of the suit in which the judgment was obtained, and when the judgment was rendered, and during the intervening time, he was residing at Schenectady, in New York; that he was not an inhabitant of Massachusetts; that during all the said time he was not in Massachusetts; was not amenable or subject [*112] to the jurisdiction of the Court in which the judgment was rendered, was not arrested or personally served with process in the said suit in Massachusetts and had not any legal notice of such suit. The plaintiff replied, that the defendant had had notice of the suit, and had by an attorney appeared to the same. There was a verdict for the plaintiff subject to the opinion of the Court as to the law. The Court said that the plea was good. They said also, that the judgment of a Court of general jurisdiction in any state of the Union, is equally conclusive upon the parties in all the other states, as in the state which it was rendered; but that this is subject to two qualifications: 1. If it appear by the record that the defendant was not served with process and did not appear in person or by attorney, such judgment is void; 2. If it appear by the record the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him. 6 Wend. 447.

If the record state that the defendant appeared in person, it has been made a question whether he is not estopped to deny such appearance. In Massachusetts the Court says: If it appeared by the record that the defendant had notice of the suit, or that he appeared in defence, we are inclined to think that it could not be gainsaid; for as we are bound to give a full faith and credit to the record, the facts stated in it must be taken to be true, judicially, and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress, for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process, or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the Court which rendered it, for it is manifestly against first principles, that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defence. *Hall v. Williams*, supra.

Cupps v. Irvin.

It is decided in New York, that the defendant may deny a statement in the record of his personal appearance. After citing *Aldrich v. Kinney*, 4 Conn. Rep. 380, to show that the defendant is not estopped by the record to deny his appearance by *attorney*, the judge, in delivering the opinion of the Court, says: If the allegation in the record of an appearance by an attorney is examinable into, in action on the judgment, and may be disproved, I can not see why the allegation of an appearance of the party in person is not in like manner questionable. *Starbuck v. Murray*, *supra*.

CUPPS v. IRVIN.

EQUITABLE TITLE—INJUNCTION.—A., holding a land-office certificate for a tract of land, executed a title-bond to B. for a conveyance at a future time of part of the land, and put him in possession. A., afterwards, sold and assigned the certificate to C., with notice of B.'s equity. D., the assignee of B., having reason to fear that C. would disturb his possession, and sell to a purchaser without notice, filed a bill in chancery to enjoin him from doing so, and obtained a decree accordingly (a).

APPEAL from the Lawrence Circuit Court.

BLACKFORD, J.—This is a case in chancery. The material facts are as follows:—Manson had a land-office certificate for a quarter section of land. The date [*113] of the entry, or the amount *paid is not stated.

He sold 30 acres of the land to Freeman, and gave him his bond for the making of a good title in the year 1829. Freeman had possession of the land so purchased, with the consent of Manson. After the execution of the title-bond, Manson sold and assigned the certificate to Irvin, the defendant, without any reservation as to Freeman's claim, informing the purchaser, that that claim was conditionally assigned to him, Manson, and that he intended to discharge the land of it. Cupps, the complainant, is the assignee of Freeman, and he has reason to fear that Irvin will disturb his possession, and also sell and assign the certificate without notice to the purchaser of the complainant's claim. The bill prays that the defendant be decreed to execute an acknowledgment of the

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trust, and enjoined from disturbing the complainant's possession, and for general relief. The Circuit Court dismissed the bill with costs.

In determining this case, it is not necessary to say what will be the extent of the complainant's claim when this title-bond shall have become due. The defendant purchased with full notice of the bond, and the testimony shows that the complainant has good cause to apprehend that his possession will be disturbed; and, also, that the defendant will sell and assign the certificate to some person without notice of the bond. These facts, we conceive, are sufficient to entitle the complainant to a decree, restraining the defendant from assigning the certificate without notice; and from interrupting the complainant's possession. The decree of the Circuit Court, dismissing the complainant's bill, is accordingly reversed; and this Court, proceeding to give such a decree as the Circuit Court ought to have given, do strictly enjoin the said Irvin from selling, leasing, mortgaging, or in any manner or for any time disposing of, the said 30 acres of land particularly described in the title-bond mentioned in the record of this case; and from assigning the certificate therefor in the record mentioned, without giving notice to the purchaser, lessee, mortgagee, assignee, or other person concerned as aforesaid, of the said title-bond, whilst the same shall remain unsatisfied; and do also enjoin the said Irvin, and every person claiming or to claim, by, through, or under him, from disturbing or in any way interrupting the possession of the said Cupps, his heirs and assigns, in the said 30 acres of land.

[*114] *To be certified, &c. Decree for costs in this Court.

Nelson, for the appellant.

Naylor, for the appellee.

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BARLOW v. THE STATE.

JURY—OBJECTIONS TO WHEN MADE.—If one of the petit jurors, summoned to try an indictment, was on the grand jury that found the bill, the defendant may challenge him. But he can not, on that ground, move for a new trial after a verdict of guilty, if he knew of the objection, and omitted to make it, when the jury was impaneled (*a*).

VERDICTS—AFFIDAVITS OF JURYMEN.—The affidavits of jurors may be received in support of their verdict, but not to impeach it (*b*).

JURY—MISCONDUCT—HARMLESS ERROR.—If a juror, during the trial of a cause, converse with a bystander, or leave the Court room without consent of the Court, it is a misdemeanor for which he may be punished. But if the investigation of the cause was not interrupted, if nothing took place which could influence the juror, and if no attempt was made to tamper with him, the misconduct will not entitle the defendant to a new trial, after a verdict against him, even in a case of manslaughter (*c*).

ERROR to the Hendricks Circuit Court.—Petition for a rehearing.

BLACKFORD, J.—This was an indictment for manslaughter. Plea not guilty. The jury found the defendant guilty, and fixed the period of his imprisonment at one year. The defendant moved for a new trial, the motion was overruled, and judgment rendered on the verdict. The cause has been brought before this Court during the present term, and the judgment affirmed.

There are two grounds taken by the counsel for the plaintiff in error in their petition for a rehearing, viz. 1st, that two of the petit jurors were members of the grand jury that found the indictment; 2dly, that there was a misbehavior of two of the petit jurors during the progress of the trial.

With respect to the first ground, the fact as above stated is admitted in the record, but the affidavits of the two jurors show, that the defendant below had previously known of their being on the grand jury. The defendant does not deny the previous knowledge, but states in his

(*a*) 32 Ind. 384; 16 *Id.* 298; 5 *Id.* 122; 7 *Id.* 63. 13 *Id.* 90; 46 *Id.* 132; 58 *Id.* 182. (*b*) 54 Ind. 339. (*c*) 58 Ind. 293.

affidavit that he did not recollect the circumstance when the petit jury was impaneled, nor did it occur to him until after the verdict had been returned. The counsel of the defendant knew nothing of the fact, until after the verdict had been given. The admissibility of [*115] the affidavits of the jurors was objected to, but the Circuit Court admitted them, and we think correctly. The rule is, that the affidavits of jurors may be received in support of their verdict, though not to impeach it. *Dana v. Tucker*, 4 Johns. R. 487. Here, the defendant had once known, that these men were on the grand jury. The statement of his not recollecting it is insufficient. An affidavit to that effect could never be disproved. This part of the case, then, presents the question, whether the objection, known to the defendant at the time of impaneling the jury, but not made until after the verdict, was good on a motion for a new trial. We think it was not. It was a good cause of challenge, but being known to the party, and not mentioned at the proper time, the right was waived. The statute of Ed. 3, said to be in affirmance of the common law, is, "that no indictor shall be put in inquest upon deliverance of the inditees of felonies or trespass, if he be challenged for that same cause by him who is so indicted." 2 Hawks. 418. That, certainly, does not warrant the making of the objection after verdict, if it were known at the time of swearing the jury. In the cases cited for the plaintiff in error, so far as we have had an opportunity of examining them, the objection has not prevailed on a motion for a new trial, where it was known at the time for making challenges, but was then neglected to be made. There is an authority, however, for the contrary doctrine, which expressly shows that the exception must be made by challenge, if known in time; and, if neglected then, can not afterwards be made on a motion for a new trial. *The State v. O'Driscoll*, 2 Bay's Rep. 153.

The other objection in the petition rests on the misbe-

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havior of two of the petit jurors. This point came before the Circuit Court on affidavits. According to one of these, a juror, after the testimony had been given, conversed with a person not of the jury respecting the case, and asked him what he thought about the evidence. The deponent was passing by them at the time he heard the said remark by the juror, and did not know what further conversation passed. The affidavit of the juror himself is, that all the conversation he had was, that he asked the person to stay and hear the result of the trial before he went home, and his answer was, that he was obliged to go.

These were the only affidavits as to that juror. [*116] Another of the *jurors, whilst the cause was progressing, went out of the Court house and stayed a few minutes. His own affidavit is, that, whilst out, he had no conversation with any one; that he was moved to go by a pressing natural occasion, and that he returned as soon as the occasion ceased. The other affidavit on the subject, is not inconsistent with that of the juror.

We have now stated the substance of the affidavits as to the misconduct of the jurors. That they acted very improperly, there can be no doubt. The one who spoke to a bystander was guilty of a misdemeanor, and liable to punishment: so also was the other, who went out of the house without asking leave of the Court. But whether for this misconduct, the verdict should be set aside, is altogether a different question. The Circuit Court may have very correctly concluded, from the evidence adduced, of the credibility of which they were to judge, that the misconduct of the jurors which we are now considering, and which occurred during the trial, did not in the slightest degree delay, or in any manner interfere with, the full and impartial investigation, and final determination, of the cause; that nothing had taken place calculated to have any influence on the minds of these jurors, and that no attempt had been made to tamper with them in any way whatever.

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Where the jury, on the trial of an indictment for a conspiracy, after the adjournment of the Court in the evening, separated and went to their respective homes, without the consent or knowledge of the Court or of the defendant, and attended the next morning at the meeting of the Court, and heard the residue of the case,—it was determined, that such separation of the jury was not of itself sufficient to vacate their verdict against the defendant. *The King v. Kinnear*, 2 Barnew. & Ald. 462. It is true, the case before the Court is of a more important nature than that referred to, but the conduct of the jury was so much more reprehensible, and the opportunity of their being tampered with so much greater, in the one case than in the other, that the decision referred to is entitled to great weight in the determination of the question before us (1).

We are clearly of opinion, therefore, that the misbehavior of these jurors was not such as rendered it obligatory on the Circuit Court to grant the new trial applied for.

We have now examined the two grounds upon [*117] which the *counsel for the plaintiff in error have chosen to rest their petition; neither of which, in our opinion, is sufficient to show that their client is entitled to a rehearing of the cause. One other exception to the judgment below was made in the argument which took place previously to the affirmance. It was of a different character from those we have just considered and had relation only to the evidence. That objection not being alluded to in the petition for a rehearing, is presumed to have been abandoned by the counsel, and we think correctly; we have, accordingly, not taken particular notice of it in this opinion. The rehearing is refused.

Fletcher, Hester, and Gregg, for the plaintiff.

Whitcomb, for the state.

(1) Vide *Rex v. Woolf*, 1 Chitt. Rep. 401, and note; *The People v. Douglass*, 4 Cowen, 26; *The People v. Ransom*, 7 Wend. 417, 423, 424; *Martin's case*, 2 Leigh, 745; *Bosley v. Farquar*, ante, pp. 61, 67, 70, and note (3).

[*118]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1828, IN THE TWELFTH YEAR OF
THE STATE.

BERRY v. BATES.

AGREEMENT TO EXTEND TIME—NUDEM PACTUM.—A., having a promissory note against B. which was due, promised him by parol and without consideration that he would not urge the payment until a certain future time. *Held*, that the promise was not obligatory (a).

SAME—DEFENCE.—An agreement under seal not to sue for a limited time, can not be pleaded in bar as a release: the defendant must resort to his action on the agreement (b).

ERROR to the Madison Circuit Court.—Bates sued Berry before a justice of the peace on a promissory note, and obtained judgment. Berry appealed to the Circuit Court, and judgment was there rendered in favor of Bates.

SCOTT, J.—The defence set up on the trial below was, that on the third of May, 1827, after the note on which suit was brought had become due, Berry paid Bates a certain other debt of 30 dollars and upwards, and 2 dol-

(a) 3 Ind. 346. (b) 32 Ind. 40; 5 *Id.* 178; 6 Blkf. 282.

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lars and .66 cents in part discharge of the note on which suit was brought; and Bates then agreed, that he would not urge the payment of the balance of the note until Christmas following; and pledged his word and honor to that effect. The Circuit Court very correctly decided that Bates was not legally bound by that promise.

[*119] *Even an agreement under seal, not to sue for a limited time, can not be pleaded in bar as a release. The party, in that case, must resort to his action of covenant as his only remedy. 2 Salk. 573; 5 Bac. Abr. 683; 1 Esp. N. P. 244 (1). The reason of the rule applies more strongly in this case, where a mere verbal promise is set up to control a written instrument for the payment of money. The payment of another debt and a part of that on which suit was brought, after the whole had become due, created no legal consideration for the promise of forbearance; and the promise being made without consideration was not legally binding. The plaintiff's pledge of honor for the performance of his promise does not alter the case, in a legal sense. He who relies on such security, must, when the pledge fails, abide the consequences; the law will not help him out.

Per Curiam.—The judgment is affirmed with 5 *per cent.* damages and costs.

Wick, for the plaintiff.

Fletcher and Brown, for the defendant.

(1) Vide *Reed v. Shaw*, Vol. 1 of these Rep. 245, and note.

 MODISETT v. LINDLEY and Another.

AGENCY—AUTHORITY OF AGENT.—If an agent execute an obligation for his principal not warranted by the power, the principal, being unapprised of the nature of the obligation, will not be bound by it, though he was in the room when the obligation was executed, and though his subsequent agent conceived himself authorized to comply with similar obligations so executed by the first agent.

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SAME—PARTNERS—DEED OF.—Although one partner can not bind his co-partner by deed, yet a deed executed by one for himself and partner, in the other's presence, and by his authority, is the deed of both (a).

APPEAL from the Vigo Circuit Court.

HOLMAN, J.—Kitchell, as agent for the defendants under an authority by deed, executed certain covenants in favor of the plaintiff, in which he transcended his authority in a material part of the covenants. On these covenants this action was founded. The defendants pleaded non est factum. On the trial of that issue, the plaintiff proved by competent testimony, that one of the [*120] two defendants, against whom this suit is *prosecuted, was in the room at the time Kitchell executed these covenants, and the witness thought that the other was present also; and that the present agent of the defendants, conceived himself authorized by the defendants to take up such covenants as these, executed by Kitchell in behalf of the defendants in favor of other persons. And, thereupon, the plaintiff's counsel prayed the opinion and direction of the Circuit Court to the jury, that these are such facts as will make these acts of Kitchell, the former agent of the defendants, although not warranted by the original power of attorney given by said defendants to said Kitchell, legally operative upon the said defendants; which direction the Court refused to give; and the defendants received a verdict and judgment.

The question arising out of the refusal of the Circuit Court to give this direction to the jury, is the only point in the case. This question is simply this: Does the presence of one or both of the defendants in the room, at the time when their agent executed these covenants, aided by the opinion of the present agent of these defendants, that he considers himself authorized by them to treat such covenants as obligatory on them, amount in

(a) 51 Ind. 66; 49 *Id.* 521.

law to a ratification of these unauthorized acts of Kitchell, or to an adoption of these covenants as their own, so as to support the issue on the part of the plaintiff, that these are the deeds of the defendants? This question has been investigated with much skill and industry by the counsel on both sides, and many cases have been cited, most of which bear but remotely on the question.

In the case of *Ball v. Dunsterville*, 4 D. & E. 313, one partner executed a deed for himself and partner, in the presence and by the authority of his partner, and it was held to be the deed of both. In *Harrison v. Jackson*, 7 D. & E. 206, one partner executed a deed for himself and his two partners, in their absence; and it was held that it was not the deed of the absent partners. Thus it appears that although one partner can not bind his co-partner by deed, yet a deed executed by one for himself and partner, in the other's presence and by his authority, is the deed of both. It is the presence of the partner that does not seal, constituting an implied assent, which is construed into an adoption of the seal as his own, that

renders it obligatory upon him. In the case before us, the defendants *were present in the room while the agent was executing these covenants; but we can not think that their being in the room constituted a being present, in the sense conveyed in *Ball v. Dunsterville*. In that case, the partner who did not seal must have been attending to, and cognizant of, what his partner was doing. Apart from such an idea, that case could not be distinguished from *Harrison v. Jackson*. In this case, the defendants were in the room; but it does not appear that they were paying any attention to the manner in which their agent was executing the authority they had delegated to him. Besides this, in *Ball v. Dunsterville* the execution of the deed was the principal and the only important circumstance in the transaction. Here, the agent had authority to execute covenants for the defendants, and we are led to presume that the covenants

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he executed were in their general form similar to those he was authorized to execute; so that the defendants might have been present, so as to know that he was executing covenants on their behalf, without having their attention directed, by any circumstance, to that particular part of the instruments in which he was transcending his authority. And if they did not know the particular form in which these covenants were expressed, their being in the room would not affect the case; as they could not be presumed to sanction that with which it does not appear they were acquainted. Therefore, admitting that although the agent transcended his authority, still if the principals, when they knew what he had done, assented to it either by expression or implication, his acts would be obligatory upon them; yet the plaintiff must fail in this part of the case.

Nor can the case derive any aid from the other branch of the testimony. These defendants, it seems, have another agent, who is transacting business for them relative to covenants executed by Kitchell, similar to those on which this action is founded, and liable to the same objections; and he conceives himself authorized by the defendants, to take up such covenants as if they were obligatory. Now what is the amount of this? Does it show that the defendants had any knowledge of the manner in which these covenants were executed, until they had oyer of them in the present action? It does not even show, that they knew the form of those other covenants of which the agent speaks; consequently they can [*122] not be *supposed to have ratified or adopted an act, of which it does not appear that they had any knowledge. The bare opinion of the agent, as to his authority relative to such covenants, is not of such a nature as to sustain any legal conclusion against the defendants. If the defendants, knowing how these covenants were drawn, authorized an agent to treat them as obligatory, it would present a different state of things. But, unless

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they possessed such knowledge, we can not conceive how any act of theirs could be made to bear upon this question. They knew that Kitchell had executed covenants on their behalf, and might reasonably presume that he had executed them according to the authority they had delegated to him, and might appoint another agent to perform these covenants for them; but this would form no conclusion against them, if, before the performance, they should discover that Kitchell had exceeded his authority in the execution of the covenants. So that admitting the general doctrine contained in all the cases cited by the plaintiff, yet the want of a knowledge in the defendants that Kitchell had exceeded his authority, destroys every ground of conclusion against them, that can be raised either from their being in the room when these covenants were executed, or from their appointing another agent to perform similar covenants for them. A knowledge of what was done must necessarily precede any implied adoption or ratification of the act; and as we conceive that this evidence falls far short of showing that the defendants had such knowledge, we are of opinion, that the evidence will not warrant the idea that the defendants have ratified or adopted these acts of their agent, and that therefore the Circuit Court acted correctly (1).

Per Curiam.—The judgment is affirmed with costs.

Judah, for the appellant.

Dewey and Tabbs, for the appellees.

(1) Vide *Posey v. Bullitt*, Vol. 1 of these Rep. 99, and note; *Flood v. Yandes*, *Id.* 102; *Deming v. Bullitt*, *Id.* 241, and notes.

[*123] *WYNN and Another, Executors, v. HIDAY.

NOTE—FAILURE OF CONSIDERATION—BREACH OF WARRANTY.—To debt on a writing obligatory for the payment of money, the defendant pleaded that the obligation had been given for a pair of mill stones, fraudulently represented to be good, but which were of no value (a).

(a) 22 Ind. 51; 47 *Id.* 259; 45 *Id.* 268; 5 Blkf. 225, 349; 7 *Id.* 136, 501; 4 *Id.* 349.

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Held, that in this case, and in that of a breach of warranty, if, in addition to the fraudulent representation, or to the breach of warranty, the defendant prove that the article is of no value, or that it has been returned or tendered within a reasonable time, he defeats the action; but if it appear that the article is of some value and has not been returned or tendered, the plaintiff recovers the value.

ERROR to the Madison Circuit Court.—This was an action of debt brought by L. Wynn, J. Wynn, and L. Abraham, executors of T. Wynn, deceased, against J. B. Hiday, on a writing obligatory, executed by the defendant to the plaintiffs' testator for the payment of 62 dollars. Pleas. 1st that the obligation was obtained by fraud, covin, and misrepresentation, to wit, by the testator's falsely and fraudulently representing to the defendant that he, the testator, owned a pair of good merchantable mill stones, and by selling them to the defendant; that the mill stones were not good and merchantable as represented, but wholly without value: 2ndly, that the obligation was obtained by fraud, covin, and misrepresentation—omitting the circumstances of the fraud. Replication to the first plea, denying the fraud and the want of value; and issue. Replication to the second plea, that the obligation was duly obtained; and issue.

After the evidence was closed, the plaintiffs called on the Court to instruct the jury, that, under the pleas of a total failure of consideration, they could not find a partial failure. This instruction the Court refused. Verdict in favor of the plaintiffs for 2 dollars, and judgment accordingly.

BLACKFORD, J.—According to the statute, the defendant may plead to an action on a specialty like the present, the want or failure of the consideration, or of any part of it. The plaintiffs contend, that where there is a plea of a total failure of consideration, under this statute, the whole plea must be proved, or the defence amounts to nothing. In this we think he is mistaken. If the de-

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fendant under his plea suitable to the case, of a total failure of consideration, prove, in addition to the [*124] fraudulent *representations, or to the breach of warranty, that the article is of no value, or has been returned, or tendered, within a reasonable time, he defeats the action. But where the article is worth something, and has not been returned or tendered, the plaintiff is entitled to the value. This we conceive to be the fair construction of the statute, and one which will prevent a multiplicity of law suits, and tend to the furtherance of justice (1).

Per Curiam.—The judgment is affirmed with costs.

Fletcher, for the plaintiffs.

Sweetser, for the defendant.

(1) R. C. 1824, pp. 294, 295. The act of 1831 is the same as that of 1824, and is as follows: "In any action founded upon any specialty or other contract (conveyances of real estate and instruments negotiable by the law merchant excepted,) the defendant, by special plea, may allege the want of a failure of the consideration or any part thereof, of such specialty or other contract; and if any specialty or other contract (excepting as aforesaid) is alleged in any other stage of the proceedings, the other party may aver in answer and prove on trial, the want of failure of the consideration in the whole or part, of such specialty or other contract, and whenever such specialty or other contract shall be given in evidence, without being pleaded, the other party may (excepting as aforesaid) prove the want of failure of the consideration or part thereof, of such specialty or other contract." R. C. 1831, p. 405.

Assumpsit on a promissory note. Plea, non-assumpsit, except as to a certain sum, and as to that a tender. A notice was attached to the plea of matter intended to be given in evidence, viz: that the consideration of the note declared on was the making of a quantity of provision barrels by the plaintiff for the defendant, under an agreement to manufacture the same so that they would pass inspection under the law regulating the inspection of beef and pork; that a portion of the barrels were manufactured in an unskillful manner, and not in compliance with the terms of the contract, whereby the defendant lost the sale of the same. On the trial, the defendant offered to prove the facts set forth in his notice. The evidence was objected to, and the objection sustained. Verdict for the plaintiff. The Supreme Court, on a motion for a new trial, said, that in *Beecker v. Vrooman*, 13 Johns. R. 302, it is settled, that deceit in the sale of a chattel may be shown in bar, or in mitigation; and that the same principle would admit the defence in the case before the Court, except as to the amount paid into Court. New trial granted. *Spalding v. Vandercook*, 2 Wend. 431.

Assumpsit in the Common Pleas for, inter alia, 45 dollars, the stipulated price of a cooking stove. The defendant, on trial, in pursuance of a notice attached to his plea, offered to prove that the plaintiff warranted the stove to draw and carry smoke well and to cook well, and that the stove did not

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draw and carry smoke well; that after every possible experiment made, it was found it would not draw; that the bottom plate was warped, and that the plates did not fit together; that the defendant took the stove to the plaintiff and offered to return it, but that the plaintiff refused to receive it back. It was not pretended that there was any *fraud* in the sale, but it was insisted that the evidence was admissible as a set-off of damages for the breach of the warranty, and to reduce the amount of the damages. The evidence was objected to, and the objection sustained. The Court charged the jury, that the plaintiff was entitled to recover the price of the stove. Verdict and judgment for the plaintiff. The defendant took the cause to the Supreme Court by writ of error, and relied on *Spalding v. Vandercook*, 2 Wend. 431; *Hills v. Bannister*, 8 Cowen, 31; *Locke v. Smith*, 10 Johns. 250; *Runyan v. Nichols*, 11 Johns. 547; *Beecker v. Vrooman*, 13 Johns. 302; *King v. Puddock*, 18 Johns. 141; *Basten v. Butter*, 7 East, 749; *Cormack v. Gillis*, cited in that case, and *King v. Boston*, there cited in a note. *Lewis v. Cosgrave*, 2 Taunt. 2; *Fisher v. Samuda*, 1 Camp. 190; 2 Stark. Ev. 640, 644, 645; *Miller v. Smith*, 1 Mason, 437; *Curtis v. Hannay*, 3 Esp. R. 82; *Jones v. Scriven*, 8 Johns. 453; *White v. Ward*, 9 Johns. 232; *Grant v. Button*, 14 Johns. 377. For the defendant in error were cited, *Howlet v. Strickland*, Cowp. 56; *Weigall v. Waters*, 6 T. R. 488; *Gordon v. Bowne*, 2 Johns. 150, 155; *Hepburn v. Hoag*, 6 Cowen, 613; *Sherman v. Ballou*, 8 Cowen, 304, 310; *Duncan v. Lyon*, 3 Johns. Ch. R. 351, 357, 359; *Livingston v. Livingston* 4 Johns. Ch. R. 287, 292, 293; *Weston v. Downes*, Doug. 23; *Powers v. Wells*, Cowp. 818; *Towers v. Barrett*, 1 T. R. 133; *Payne v. Whale*, 7 East, 274; *Thornton v. Wynn*, 12 Wheat. 183; *Tye v. Gwynne*, 2 Campb. 346; *Farnsworth v. Garrard*, 1 Campb. 38, 40; *Barnard v. Leigh*, 1 Stark. R. 43. The defendant in error contended, that it was necessary to show *fraud* to let in such a defence as was offered in this case.

The Court delivered an elaborate opinion in favor of the plaintiff in error, saying that when the damages arising from a breach of a warranty in the sale of chattels had been allowed to be given in evidence, to reduce the amount of recovery below the stipulated price, the defence was admitted to avoid *circuity of action*; that a second litigation on the same matter should not be tolerated, where a fair opportunity could be afforded by the first to do final and complete justice to the parties; and that if a defence resting on such a principle was allowed, as they thought it was, in a case of a warranty *mala fide*, they saw no good reason for not allowing it in a case of a warranty *bona fide*. The authorities cited by the Court, not referred to by the counsel, were *Leggett v. Cooper*, 2 Stark. R. 103; *Frisbee v. Hoffnagle*, 11 Johns. 50. Judgment of the Common Pleas reversed. *M'Allister v. Reab*, 4 Wend. 483. The defendant in error removed the case to the Court of Errors, where, after a full investigation, the judgment of the Supreme Court was affirmed. The opinion, expressed in the Court of Errors by the Chancellor, is, that it appeared to be settled in England that, when there has been a sale either upon a warranty as to the goodness of the article sold, or upon a fraudulent misrepresentation of its value, if a suit be brought on the original contract of sale, the defendant may, upon notice of such defence given with the general issue, prove the fraud or breach of warranty in mitigation of damages; and that the law was the same, according to the New York decisions, although a bill or note be given for the purchase-money. *Reab v. M'Allister*, 8 Wend. 109. The authorities mentioned by the Chancellor, in the case last-cited, not noticed in the cause before the Supreme Court, are *Evans v. Grey*, 12 Martyn's R. 478; *Sample v. Looney*, 1 Overton's T. R. 85; *Poulton v. Lattimore*, 4 Man. & Ry. R. 208. S. C. 9 Barn & Cress. 259.

Poulton v. Lattimore, supra, was decided in 1829. It was an action of assumpsit to recover the contract price of a certain quantity of cinq foin seed, warranted to be good new growing seed. Plea, non-assumpsit. It was proved that the seed was not good growing seed; that the defendant had not

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returned it, but had sowed part and sold the residue; and that the part sold had proved wholly unproductive. Verdict for the defendant. LITLEDAL, J.—“Where goods are warranted, the vendee is entitled, though he do not return them to the vendor, or give notice of their defective quality, to [126] bring *an action for breach of the warranty; or, if an action be brought against him by the vendor for the price, to prove the breach of the warranty, either in diminution of damages, or in answer to the action if the goods be of no value.” Judgment for the defendant.

The following case occurred in 1831: Assumpsit for the price of a horse sold and delivered. Plea, non-assumpsit. Verdict for the defendant. Rule to show cause why the verdict should not be set aside, and a verdict entered for the plaintiff for 43*l*. The cases cited in support of the rule, not mentioned in the opinion of the Court, are *Fielder v. Starvin*, 1 H. Bl. 17; *Parker v. Palmer*, 4 Barn & Ald. 387; *Hunt v. Silk*, 5 East, 449. Lord TENNENT, C. J.—“The facts of the case were these: The plaintiff, on the 2d of February, sold the horse to the defendant for 43*l*, with a warranty of soundness. The defendant took the horse, and on the same day sold it to Bailey for 45*l*. Bailey, on the following day, parted with it in exchange to Osborne; and Osborne, in two or three days afterward, sold it to the defendant for 30*l*. No warranty appeared to have been given on any of the three last sales. The horse was, in fact, unsound at the time of the first sale; and on the 9th of February the defendant offered to return it to the plaintiff, who refused to accept it. The question for consideration is, whether the defendant, under these circumstances, had a right to return the horse, and thereby exonerate himself from the payment of the whole price?”

“It is not necessary to decide, whether in any case the purchaser of a *specific chattel*, who, having had an opportunity of exercising his judgment upon it has bought it, with a warranty that it is of any particular quality or description, and *actually accepted and received* it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor, and exonerate himself from payment of the price, on the ground that he has never received that article which he stipulated to purchase. There is, indeed, authority for that position. (*Curtis v. Hamay*, 3 Esp. R. 82, and 2 Stark. Ev. 645, are here referred to.) It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. *Weston v. Downes*, 1 Doug. 23; *Towers v. Barrett*, 1 T. R. 133; *Payne v. Whale*, 7 East, 274; *Power v. Wells*, Doug. 24, n.; *Emanuel v. Dane*, 3 Campb. 299; where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser can not by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he can not, by the same means protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action. *Cormack v. Gillis*, cited 7 East, 480; *King v.*

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Boston, 7 East, 481, n.; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid.

[*127] "It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial. *Okell v. Smith*, 1 Stark. M. P. C. 107; nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain *specific chattel*, accepted and received by the vendee, and the property in which is completely and entirely vested in him.

"But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to show that he may return it where the purchaser has done more than was consistent with the purpose of trial, where he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case; and even supposing it might have been competent for the defendant to return this horse, after having accepted it, and taken it into his possession, if he had never parted with it to another, it appears to us that he can not do so after the re-sale at a profit.

"These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant, that the particular chattel was his own; and it may be added, that the parties can not be placed in the same situation by the return of it as if the contract had not been made, for the defendant has derived an intermediate benefit in consequence of the bargain, which he would still retain. But he is entitled to reduce the damages as he has a right of action against the plaintiff for the breach of warranty. The damages to be recovered in the present action have not been properly ascertained by the jury, and there must be a new trial, unless the parties can agree to reduce the sum for which the verdict is to be entered; and if they do agree, the verdict is to be entered for that sum. Rule absolute on the above terms." *Street v. Blay*, 2 Barn & Adol. 456.

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ARREST—JUSTIFICATION—WRIT.—Although in a justice's warrant for the apprehension of an offender, the time when the offence was alleged to have been committed be subsequent to the date of the warrant, the constable is justifiable in executing it.

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SAME.—If the defendant, in pleading a warrant in justification of an arrest, aver that he was an acting deputised constable of the county, the word *deputised* may be considered as surplusage; and the plea will be good, though it do not set out the defendant's appointment, nor allege that the warrant was shown to the plaintiff, nor that it was returned (a).

¶128] SAME—JUSTIFICATION.—*Though two offences against the party be charged in the warrant, yet, if the justice has jurisdiction over both, the constable is bound to execute it.

SAME—ASSISTANCE.—A person acting as a special constable to execute a warrant, is authorized to command assistance in case of opposition.

ERROR to the Hendricks Circuit Court.

SCOTT, J.—To an action of assault and battery, the defendants pleaded a justification under a warrant from a justice of the peace; to which plea there was a demurrer, and judgment for the defendants.

It is objected, 1st, that the warrant set out in the plea shows, on its face, that it was for an offence committed posterior to its date; 2ndly, that there is no averment that the defendant showed the warrant; 3rdly, that it is not shown that the warrant was returned; 4thly, that the plea does not show the appointment of the constable; 5thly, that the warrant purports to be for an affray or assault and battery over which, jointly, the justice had no jurisdiction; 6thly, that the defendant, Kise, styles himself an acting deputised constable of the county of Hendricks, when our law knows no such officer; and 7thly, that although the plea may be a justification to Kise, the constable, yet it is no justification as to Wilson, who acted as an assistant.

To the first objection it may be replied, that it was not essential to the validity of the warrant, that the time of committing the offence should be set out. Without such statement, the command of the justice was binding upon the constable. The statement of an impossible time is therefore to be regarded as redundant. See 5 Bac. Abr. 415. But were it necessary that the day of the offence

(a) 4 Blkf. 171; 5 *Id.* 206; 15 Ind. 26, as to *return* overruled in 4 Blkf. 330.

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should be expressly stated, a constable has no power to judge in such cases: he was commanded to arrest the offender and bring him before the justice, and he was bound to obey that command. See 6 Bac. Abr. p. 166; Cro. James, p. 280. To the second objection, it is necessary only to reply that the defendant, Kise, states that he was an acting constable of the county of Hendricks. The word *deputised* is redundant and may be rejected. As he was an acting constable of the county, with a justice's warrant in his hand, all persons were bound to recognize him as an officer and obey him accordingly. This also, is an answer to the fourth and sixth objections to [*129] the plea. The third *point has the sanction of some authorities. It was formerly held, that, where an officer justifies under a process which is returnable, he must show that it has been duly returned; but the later decisions do not require a return, and we think they are more consistent with justice, and founded on better reason. See *Bealls v. Guernsey*, 8 Johns. R. 52, and the authorities there cited. The fifth objection is obviated by a reference to the statute, R. C. 1824, p. 236, where jurisdiction is expressly given to justices of the peace, of assaults and batteries, and affrays, &c.; and two offences being named in the warrant, could not justify the constable in disobeying the command of the justice, who had jurisdiction of both or either of them. If we can understand anything by the seventh objection, it is the idea of the plaintiff's counsel that the defendant, Kise, was acting as a special constable for that particular occasion, and that in that capacity he had no power to command assistance in case of opposition. The contrary doctrine, we think, is clearly deducible from our statutes. R. C. 1824, pp. 82. 246; and it is also settled by various decisions. See 1 Litt. R. 268; 2 Litt. R. 367; 8 Johns. R. 54.

Per Curiam.—The judgment is affirmed with costs.

Brown and Gregg, for the plaintiff.

Fletcher, for the defendants.

Sweny and Others v. Ferguson, Adm'x, and Others. In Chancery.

SWENY and Others v. FERGUSON, Administratrix, and Others. In Chancery (a).

THE heirs of Sweny filed a bill in chancery against the administratrix and the heirs of Ferguson. The bill states that Ferguson, deceased, was the administrator of the estate of the complainant's father; that he sold the property which came into his hands as administrator for a large amount, the most of which he converted to his own use; and that his estate is insolvent. It further states that Ferguson, in his life-time, conveyed a certain tract of land to his son, one of the defendants, for the purpose of defrauding the complainants. The prayer of the bill is, that a decree be rendered for the [*130] *amount of the complainant's claim, and that the land so fraudulently conveyed be sold to satisfy the same. The bill was taken *pro confesso*.

The Court, on examination of the bill, allegations, and proofs, decreed that the defendants should pay to the complainants the sum of 491 dollars; and, if the same were not paid on service of a copy of the decree, the land should be sold, &c.

RAPP v. GRAYSON, on Appeal.

COMMISSION MERCHANT—LIABILITY—CUSTOM (b).

THE refusal of the Court to give instructions to the jury, which are good law but not applicable to the case, can not be assigned for error.

The usages of commerce regulate the duties and privileges of commission merchants, and generally form their contracts in business; which usages are matters of fact, and susceptible of proof.

(a) 4 Ind. 546.

(b) 23 Ind. 399; 10 *Id.* 325.

Rapp v. Grayson, on Appeal.

It is as much the duty of a commission merchant to obey instructions, with regard to the shipping of goods deposited with him to be shipped, as it is to keep them safely while in his care. This duty devolves on all who are acting for him as clerks or agents; and, while they are recognized as acting for him, their authority must be presumed to be co-extensive with his, as to the business he is thus transacting by them.

G. deposited goods in the warehouse of R., a commission merchant, and R. agreed to ship the goods to a certain place by a good boat, but not with W. and his boat. R., afterwards, shipped the goods with W. and in his boat. *Held*, in case the goods were lost,—first, that R. was liable to G. for the damages sustained by the loss, and that he would have been so liable, had he merely contracted for the safe keeping of the goods; secondly, that even if R. were not bound, in law, to obey the instructions given him as to the shipping of the goods, he would still be subject to the action of G. for delivering the goods to W. contrary to those instructions; thirdly, that though G. might have recovered against W., and the recovery would have barred a subsequent suit against R., yet G.

was not bound to resort to W. But it was also [*131] *held*, that the action by G. against *R. could not be sustained without proof of the loss of the goods.

If the evidence, relative to the merits of the action, be contradictory, and the jury have any grounds for their verdict in favor of the plaintiff, a Court of errors will not reverse a judgment on the verdict, because a new trial had been refused. *Aliter*, if there was no evidence of a fact essential to the support of the action.

King, Administrator, v. Anthony, Administrator.

KING, Administrator, v. ANTHONY, Administrator.

JUDGMENT—ERROR IN—CURED—PRACTICE.—Assumpsit against an administrator on promises of the intestate. Pleas, non-assumpsit, the statute of limitations, and plene administravit. Judgment against the defendant *de bonis propriis*. *Held*, that as neither of the pleas was false within the defendant's knowledge, the judgment *de bonis propriis* was erroneous; but that as this was only a clerical mistake, time would probably be given for its amendment below, were there no other error in the case (a).

SAME—FINDING—PRACTICE.—In an action against an administrator, if, on the pleas of non-assumpsit and plene administravit, the jury find for the plaintiff, they should also find the amount of the assets in the defendant's hands unadministered (b).

PLEADING—DUPLICITY—WAIVER.—If two replications be filed to one plea, the defendant may demur specially for the duplicity; but a rejoinder to the replications cures the objection.

PARTIES—JOINT—JUDGMENT.—If the plaintiff, in an action against two, proceed to judgment against one alone, and the record do not contain a return of the writ that the other had not been found, and a suggestion of such a return, the judgment will be reversed on error (c).

ERROR to the Vanderburg Circuit Court.

BLACKFORD, J.—Assumpsit by the administrator of Jonathan Anthony, against Thornberry and his wife, administratrix, and King, administrator, of James Anthony. There is no return of the writ in the record, nor a suggestion, showing that any of the defendants had not been found. King appeared and pleaded, first, non-assumpsit; secondly, the statute of limitations; thirdly, plene administravit. Issue was joined on the first plea. To the second, there were two replications: one, that the case was within an exception of the statute; the other, denying the plea generally. Rejoinder and issue as to the first replication; and an issue on the second. To the third plea the plaintiff replied that the defendant had assets; and on that, issue was joined. The verdict was as follows: "We of the jury find for the plaintiff, and assess

(a) Post, 459. (b) 5 Blkf. 44. (c) Post, 142; 8 Blkf. 100

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his damages at 1,000 dollars." A motion for a [*132] new trial was made and overruled, and the following judgment rendered: "It is on motion considered by the Court, that the plaintiff recover the sum aforesaid by the jury assessed, with interest thereon till paid, together with costs, &c."

The judgment in this case being *de bonis propriis*, is erroneous. None of the pleas can be considered false within the defendant's own knowledge, like that of *ne unques executor*, or a release to the defendant (1). As this is, however, only a clerical mistake, *Short v. Coffin*, 5 Burr. 2730, time would probably be given for its amendment in the Court below, were there no other error in the case (2). But the verdict is also erroneous. On the pleas of non-assumpsit by the intestate, and plene administravit by the administrator, the jury finding both issues for the plaintiff, should have not only assessed the damages for the not performing of the promises, but should have also found the amount of the assets in the hands of the administrator unadministered; the administrator being liable no further than for the assets in his hands. *Fairfax's Executor v. Fairfax*, 5 Cranch, 19; *Siglar, Admr. v. Haywood*, 8 Wheat. 675.

The objection to the proceedings, on account of their being two replications to one of the pleas, comes too late. It is true, that the statute of Anne, authorizing double pleading, does not extend to replications, 1 Chitt. Pl. 549; neither does ours, R. C. 1824, p. 292. But duplicity in pleading can only be taken advantage of by special demurrer. 1 Chitt. Pl. 513. In this case, the defendant rejoined to both the replications; and that put an end to his right to the objection he now makes.

One of the defendants in this action appeared and pleaded, and the plaintiff proceeded against him alone. There is no return of the writ in the record, that the others had not been found, nor any suggestion of such

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return; both of which were necessary to warrant this proceeding. R. C. 1824, p. 290 (3).

Per Curiam.—The judgment is reversed, &c. Cause remanded, &c.

Hall, for the plaintiff.

Judah, for the defendant.

(1) Vide note to *Weathers v. Newman*, Vol. 1 of these Rep. 233.

(2) Vide *Songer v. Walker*, Vol. 1 of these Rep. 251, and note.

(3) Vide *Morris v. Knight*, Vol. 1 of these Rep. 106, and note. R. C. 1831, v. 400.

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TRESPASS—FORCIBLE ENTRY—EVIDENCE.—A. removed from a house and lot, leaving a few articles in the house and on the lot, and fastening the door. In the night of the second day afterwards—the door being proved to have been still fast on the evening of that day—B. entered into the house and put a tenant in possession, directing him to prevent every person, and A. particularly, from taking possession, and threatening to beat and prosecute any one who should enter on the premises. There was no direct proof, however, that B. broke open the door. On the complaint of A. against B. for forcible entry and detainer, *held*, that the evidence would justify a finding against the defendant as to the forcible entry; and that it was clear against him as to the forcible detainer, which, under the statute, entitled the plaintiff to restitution (a).

ERROR to the Dearborn Circuit Court.

SCOTT, J.—Luke Evill brought an action of forcible entry and detainer against Elias Conwell, before two justices of the peace of Dearborn county, and had a verdict and judgment in his favor; from which Conwell appealed to the Dearborn Circuit Court. The appeal, by consent of parties, was tried by the Circuit Court, without the intervention of a jury; and on that trial the judgment of the Court was in favor of Conwell. To reverse that judgment is the object of the present writ of error.

(a) 6 Ind. 273.

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The testimony, as set out in a bill of exceptions, is in substance as follows: On the premises in controversy there was a dwelling house and garden, enclosed with a fence. On a Friday in March, 1825, Evill, the plaintiff in error, left the premises and moved his family and furniture into a house in the town of Aurora, leaving in the house some sash and a work bench, and on the premises a quantity of brick, lime, some garden stuff, and a cow. The doors of the dwelling house were shut and fastened with latches, and the latches secured with nails over them. In this situation the premises were seen on the Sunday evening after the plaintiff left them. On that night, after dark, and after the witness had undressed for bed, he was called upon by the defendant to go with him to take possession of the premises; and on Conwell's agreeing to see him harmless, the witness took his wife and bed and went to the house and found the outer door open, by which they entered; and Conwell delivered possession to the [*134] witness and gave him a lease for three years,*with instructions not to permit Evill, or any other person, to take possession of the place; and the witness has ever since that time occupied the premises as tenant under Conwell. A day or two afterwards, persons sent by the plaintiff's directions were turned away by the tenant. One witness stated, that, while hunting his cattle for the purpose of hauling away the lime, at the plaintiff's request, from the said premises, and before he came to or near the place, he was met by Conwell, who, being informed of his design, forbade his going on the premises, and threatened to beat and prosecute any person who should go upon them; in consequence of which threatening the witness desisted. It was not proved that Conwell was ever afterwards on the premises.

In this case, the only doubtful point seems to be whether Conwell, in taking possession, made use of such force as to lay him liable to this action. There is nothing in the testimony before us amounting to positive proof that Con-

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well, in making his entry, used any actual violence. But we think the facts of his taking possession in the dead of night, and entering a house which was, in the evening, secured by having a nail over the latch; his directions to his agent to prevent all persons, and the plaintiff in particular, from getting possession; and his maintaining that possession with threats of personal violence; were, all taken together, sufficient to justify the Circuit Court in finding a forcible entry. But even if his entry by stealth, under the shade of night, was without force, our statute gives this remedy where the entry may have been peaceable, but the possession maintained with force and strong hand. The testimony, in this case, leaves no doubt of Conwell's maintaining his possession with threats and strong hand: his agent on the premises actually turned away persons who were sent there by Evill; and he himself threatened to beat any person who should go upon the land. For this reason we think the plaintiff was entitled to restitution (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Dunn, for the plaintiff.

Stevens and Lane, for the defendant.

(1) R. C. 1824, p. 212. R. C. 1831, p. 265.

[*135] *MODISETT v. The Governor, on the relation of WILLIAMS.

OFFICIAL BONDS—LIABILITY OF SURETY—ACT OF OFFICER IN SATISFYING JUDGMENT.—If satisfaction of a judgment be entered by a justice of the peace on his docket, he and his sureties are liable for the amount to the judgment-creditor; no matter for what consideration the satisfaction was entered, unless the creditor was a party to the arrangement (a).

(a) 3 Blkf. 72; 4 Id. 129.

Modisett v. The Governor, on the relation of Williams.

EVIDENCE—PROOF OF EXECUTION OF RECEIPT.—In the docket of justice A., which, for some reason not shown, was in justice B.'s hands, there was a receipt purporting to be signed by B. of a judgment there entered: *Held*, that the receipt was not admissible as evidence against B., without proof of his having executed it.

APPEAL from the Vigo Circuit Court.

HOLMAN, J.—Scire facias against Graham, a justice of the peace, and King and Modisett his sureties; charging that Graham, as a justice of the peace, had collected the amount of several judgments entered in favor of Mark Williams on the docket of Joel Downey, a late justice of the peace, deposited with said Graham; and had failed to pay the money over to the said Williams. Modisett pleaded severally, that Graham had not received the said sums of money, and neglected and failed to pay the same, as charged in the declaration. On which plea, the plaintiff joined issue. Verdict and judgment for the plaintiff.

On the trial, as appears by a bill of exceptions, the defendant offered in evidence the declarations of Williams, that Graham had never received any money as charged in the declaration; and also offered to prove that the judgments of Williams against King, the amount of which the plaintiff claimed in this action, had been entered satisfied, not by a payment in money, but by King's promissory note. But the Circuit Court rejected this evidence; being of opinion that, unless it was made to appear that a combination had been entered into by Williams, Graham, and King, to defraud the defendant, this evidence could not go to the jury. This decision was correct. When a judgment of a justice of the peace is regularly entered satisfied, the plaintiff, in order to obtain his money, must resort to the justice. He can not take out execution on the judgment after satisfaction is entered on the docket, notwithstanding he might [*136] know that the satisfaction had been entered *without a payment of the money. The official entry on the docket is conclusive against the justice and his

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sureties, and the plaintiff has a right of action against them for his money, without any reference to the manner in which the judgment has been satisfied. If Williams had assented to such a discharge of his judgment, or had in any way combined with Graham or King, for the purpose of rendering Modisett liable for the amount of the judgments, such facts might have been shown in the defence. But the evidence here offered goes only to the knowledge of Williams that no money was paid, and does not pretend to show that he assented to, or was in any way concerned in, the transaction. The evidence was therefore properly rejected.

Another bill of exceptions states, that the plaintiff offered in evidence, to support the issue on his part, a paper reputed to be the docket of justice Downey, appearing to be signed by said Downey as such justice, and containing certain reputed receipts of justice Graham; after having only proved that the said docket, in the possession of said Graham, appeared to be signed by said Graham, as such justice; without having proved any license to intermeddle with the judgments upon said docket, according to the act of assembly in such case made and provided, or any other authority; and without having proved that Graham wrote said receipts, or that the same were in his hand-writing. To the admission of which paper in evidence, the defendant objected; but the Circuit Court overruled the objection, and permitted it to go as evidence to the jury. These reputed receipts of Graham were not admissible as evidence without proof of their execution. And we consider the expressions in this bill of exceptions, though somewhat obscure, as showing that there was no proof of their execution. The language of the bill is that they were admitted in evidence, without any proof that they were written by Graham, or were in his hand-writing. Their being on a paper, reputed to be the docket of another justice of the peace, which was found in Graham's possession, can not

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alter their character, unless it was shown that Graham had authority to intermeddle with the judgments on that docket; and as it is said that no such authority was shown, the receipts must stand as if they were on any other paper; and their execution should have [*137] been proved before *they were admitted as evidence. The Circuit Court therefore, acted incorrectly in admitting this reputed docket, containing these reputed receipts, to go in evidence to the jury.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Tabbs, for the appellant.

Dewey, for the appellee.

LAMBERT v. SANDFORD.

RES ADJUDICATA—NOLLE PROSEQUI.—A *nolle prosequi* to the whole declaration has the effect, not of a *retraxit*, but of a discontinuance; and is no bar to a subsequent suit for the same cause.

ATTORNEY—AUTHORITY OF.—An attorney at law has no authority to enter a *retraxit*; that being a perpetual bar.

PRACTICE—REVERSAL.—A judgment will not be reversed because a motion for a new trial, made on the ground of a verdict's being contrary to evidence, has been overruled; unless it be clear that the verdict is not warranted by the evidence (a).

BILL OF EXCHANGE—EXTENSION OF TIME—RELEASE.—If the payee of a bill of exchange, accepted for the drawer's accommodation, give time to the drawer without the acceptor's knowledge, the latter is not thereby discharged; though the payee knew that the acceptance was made for the drawer's accommodation (b).

ERROR to the Vigo Circuit Court.

BLACKFORD, J.—Sandford, as the indorsee of Boudinot, brought this action of assumpsit against Lambert, as the acceptor of a bill of exchange, drawn by Hamilton in

(a) 35 Ind. 356; 37 *Id.* 361.

(b) 7 Blkf. 363; 35 Ind. 304; 55 *Id.* 45; 43 *Id.* 163; 51 *Id.* 124.

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favor of Boudinot, cashier. The defendant, Lambert, pleaded, first, non-assumpsit; on which issue was joined. He pleaded, secondly, that the bill became the property of the bank of Vincennes by the blank endorsement of Boudinot, cashier, and his delivery thereof to the bank; that the bank, owners of the bill, sued the defendant, Lambert, thereon; and after service of the writ, and after the defendant had pleaded, the parties appeared by their attorneys, and the plaintiffs would not further prosecute their suit, therefore it was considered that the plaintiffs should take nothing by their writ, but be in mercy, &c., and that the defendant should go thereof without day. To this plea, there was a general demurrer, and judgment for the plaintiff. The defendant pleaded, thirdly, that on the first of July, 1822, the charter of the bank of Vincennes became forfeited, and its franchises were [*138] seized by the state; and that, at the time *of the forfeiture and seizure, the bill belonged to the bank. To this plea the plaintiff replied that, at the time of the seizure, the property of the bill was not in the bank. On this replication issue was joined.

On the trial of the issues, the defendant offered to prove that he accepted the bill for the accommodation of the drawer, which was known at the bank when the bill was discounted; that after the bill became due, the bank stopped the drawer at Vincennes, on his way down the river, in May, 1821, in consequence of the non-payment of the bill, and then agreed to give him three months for payment from the time the bill became due, on his paying the discount; that the discount was paid, and the credit given, without the knowledge of the defendant; and that the drawer was, at the time of this arrangement, able to pay. This testimony was objected to, and the objection sustained.

At the trial it was admitted, that the franchises of the bank were seized on the first of July, 1822. The plaintiff proved the signatures of the acceptor, endorser, and

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drawer. He proved that on the 8th of February, 1822, Hart, as attorney of Sandford, the plaintiff, gave notice to the defendant, that the bank had assigned the bill to Sandford. He proved that Tabbs, as attorney of the bank, in the fall of 1821, or winter of 1822, had filed a declaration against Lambert on the bill; that the bill, when delivered to him, belonged to the bank; that shortly after the commencement of the suit for the bank, it was conducted by him and Hart under the impression that the property was in Sandford; that from the spring or winter of 1822, he considered the bill as the property and under the control of Sandford; that the bill was always in Tabbs' possession from its delivery to him until it was filed in the papers of the suit; that Sandford never had actual possession of the bill; that Tabbs had only been attorney for Sandford, as to this bill, since Hart's death in December, 1822; that the endorsement on the bill, "Pay to Isaac Sandford or to his order," was made at the April term, 1825; that Tabbs' receipt to the bank for collection had been returned to him; and that the suit of the bank against the defendant was dismissed at the October term, 1824.

This was all the evidence in the cause. The jury gave a verdict for the plaintiff for 1,020 dollars in damages; a motion for *a new trial was made and overruled; and judgment rendered according to the verdict.

The plaintiff in error relies upon three grounds for the reversal of the judgment: 1st, that the second plea was a good bar, and the demurrer to it should not have been sustained; 2d, that the Court should have granted a new trial, the plaintiff below having failed to prove any property in the bill; 3d, that the evidence offered as to the discharge of the defendant, on account of time given to the drawer, should have been admitted.

As to the first objection, assuming that the suit of the bank was disposed of by a *nolle prosequi*, which is the most

that the plaintiff in error contends for, we think the law is against him. It has been held that a *nolle prosequi* can not be distinguished in reason from a discontinuance, for, in either, the party may afterwards commence another action for the same cause. *Cooper v. Tiffin*, 3 T. R. 511. And in a late valuable book on practice, one of the grounds on which a *nolle prosequi* to the whole declaration is distinguished from a *retraxit* is, that the former is not a bar to a future action for the same cause. 2 Arch. Prac. 250. Besides, the plea states this disposition of the cause to have been made by the attorney; who had no authority to enter a *retraxit*, because that is a perpetual bar. *Kellogg v. Gilbert*, 10 Johns. R. 220. If a *nolle prosequi*, therefore, when made in person, were a bar to another suit, it would not be so in this case, the entry here being by attorney.

The second objection is not more substantial than the first. It is true, that the evidence is not clear, as to whether the property of the bill was in Sandford, or in the bank, at the time the franchises of the corporation were seized. The endorsement of Boudinot, the payee, was in blank. The gentleman who had the bill, and was the attorney for the bank, considered it, for a considerable time before the seizure, as the property of Sandford, and under his control. His reasons for so considering it, are not stated. If the defendant below supposed them insufficient, he should have inquired what they were. The jury to whom the question was submitted, after hearing a variety of testimony, have determined it in favor of the plaintiff below, and the Court in which it was tried has refused to disturb the verdict. Con-
[*140] sidering the point, as we do, a doubtful one, *it becomes us, as an appellate Court, to let it rest where it is.

The third objection is one of more difficulty. A bill is accepted for the drawer's accommodation; and a bank, knowing that, discounts it for the drawer. The bill be-

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comes due, and the bank gives the drawer an additional credit, without the knowledge of the acceptor. The question is, does this indulgence to the drawer discharge the acceptor, as to a holder who received the bill after it became due? The plaintiff in error contends, that the acceptor here is only a surety, and refers to a case in *Hardress*, 485. Should that case be thought to bear upon this, it is answered by *Raborg v. Peyton*, 2 Wheat. 385, which expressly overrules it. Indeed, without going further, this latter decision settles the point, that the acceptor, whether for the drawer's accommodation or not, is a principal, and not a surety, as to the payee. The Court says, that, "*prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor; and is, of itself, an express appropriation of those funds for the use of the holder. The case may, indeed, be otherwise; and then the acceptor, in fact, pays the debt of the drawer; but as between himself and the payee it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he can not resort to the drawer but upon a failure of due payment of the bill." In the case before us, the bank lent the money to Hamilton upon the security of this bill; that Lambert should be the acceptor, and therefore liable as the principal, was the consideration of the loan. Had it been otherwise, it is fair to presume that Hamilton would have been the acceptor. The bank's knowledge that the acceptance was for the drawer's accommodation, is not considered material; for it was not, in our opinion, essential to the validity of the bill, or to its legal effect according to its face, as respected the payee, that the acceptor should be benefited by the consideration. In this view of the subject, the time given to Hamilton, can not affect the responsibility of Lambert, the principal in the contract. He was liable to a suit on his acceptance at any time after the bill became due, and could derive no benefit, not even of delay, from the bank's arrangement

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with the drawer for time. Neither could the indulgence to the drawer operate to the injury of the acceptor; for if before the expiration of the time given, Lambert [*141] had been *compelled to pay, his remedy over against Hamilton would not have been retarded by the arrangement between the latter and the bank, with which Lambert had no concern, and by which he could not be bound. As to this third ground relied on by the plaintiff in error, his strong authority is *Laxton v. Peak*, 2 Campb. N. P. 185. That case, however, is contradicted by the subsequent one of *Fentum v. Pocock*, 5 Taunt. 192, cited by the defendant in error. The latter is in accordance with our ideas of the law (1).

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

Judah and Dewey, for the plaintiff.

Tabbs, for the defendant.

(1) Vide on this subject, *Kerrison v. Cooke*, 3 Campb. 362; *Adams v. Gregg*, 2 Stark. R. 531; *Hill v. Read*, D. & R. 26. The drawer is not discharged by the giving of time to the accommodation acceptor. *Collet v. Haigh*, 3 Campb. 281. Nor, if the acceptor be the agent of the drawer, is the latter discharged by time given to the former. *Clarke v. Noel*, *Id.* 411. In a very late case, PARKE, J., says: "I think that the decision in *Fentum v. Pocock*, where it was held that the acceptor of an accommodation bill was not discharged by giving time to the drawer, is good sense and good law." *Price v. Edmunds*, 10 Barn. & Cress. 578.

 PECK and Others v. BRAMAN and Others, in Error.

INFANT—RIGHT TO COMPEL GUARDIAN TO ACCOUNT (a).

AN infant, after his guardian's death, has a right to compel a settlement of his accounts as if he were of age; the guardian's trust being personal, and terminating at his death. Bac. Abr. tit. Guardian.

In the case of a guardianship until the ward is of full age, the general rule is, that the ward must be of age be-

(a) 8 Blkf. 15; 15 Ind. 230.

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fore he can require his guardian to account; yet, in chancery, a ward may, during his minority, call such a guardian to account, if anything should occur which makes it necessary. *Ib.*

The guardianship of minors, and the adjustment of their accounts, form a conspicuous branch of chancery jurisdiction. *Ib.* 2 Fonb. Eq. 225—251; *Beaufort v. Berty*, 1 Peere Wms. 702; 1 Bl. Comm. 463.

The extension of the jurisdiction of Courts of [*142] law, in modern *times, to cases which were formerly subjects of equitable jurisdiction only has not destroyed the jurisdiction of Courts of equity. *Kemp v. Pryor*, 7 Ves. 249.

When accounts are intricate and difficult, a bill in equity is the more usual and suitable proceeding to compel an account; being best calculated to do justice between the parties; since the plaintiff can thereby obtain a discovery of books and papers, and have the benefit of the defendant's oath; who, on the other hand, is entitled to all both legal and equitable allowances. *Paley on Agency*, 57.

The heirs of A., some of whom were infants, and his representatives, filed a bill in chancery against the heirs and representatives of B. The bill stated that B., the guardian of A.'s heirs, having contracted to sell their land to C., procured an order of the Court in Connecticut, where the land was situated, authorizing its sale by D.; that D., pursuant to the order, sold and conveyed the land to C. for 1,500 dollars, which amount had nearly all been received by B.; that bonds to the Court were executed by D. and E., conditioned that B. should vest the purchase-money in other land for the heirs of A., or lay it out for their nurture, education, or advancement, and should account to the Court when required, or to the heirs when they should come of age: that B. having married the widow and administratrix of A., became possessed of the intestate's personal estate to a considerable amount:

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that B. afterwards removed from Connecticut to Indiana, purchased land here with the money of A.'s heirs received as aforesaid, took the title in his own name, and died without accounting to them, or leaving personal property sufficient to pay their claim. The bill prayed for a discovery, relief, &c.

Held, that a demurrer to the bill, on the ground of the complainant's remedy being at law, could not be sustained; the case being within the jurisdiction of a Court of chancery.

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JOINT PARTIES—RELEASE OF ONE.

IF a suit be brought on a collector's bond against the principal and sureties, it is error to take judgment [*143] against the *sureties alone, without a suggestion on the record of the sheriff's return to the writ of "non est inventus" as to the principal. R. C. 1824, p. 290; *Morris v. Knight*, 1 Blackf. 106; *Colman v. Graeter*, id. 388. See 1 Saund. p. 207, n. 2, p. 291, n. 4 (1).

(1) *King v. Anthony*, ante, p. 131, R. C. 1831, p. 400.

BLACKWELL v. The BOARD of JUSTICES of Lawrence County.

COUNTY—PUBLIC CORPORATION—POWER TO CONTRACT.—A statute authorized the re-location of the seat of justice in a county, and gave to the owners of lots in the old town, after the re-location, on their complying with certain conditions, a right to a conveyance by the county agent of certain lots in the new town in exchange for theirs in the old one. The county accepted the statute, and the seat of justice was removed. *Held*, that the owner of a lot in the old town, having performed the precedent conditions prescribed by the statute, and demanded of the county agent a conveyance for the proper lot in the new town, might, if the title were refused, maintain an action of assumpsit against the Board of Justices for a breach of their contract, implied from the county's acceptance of the statute (a).

(a) 4 Blkf. 208.

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SAME—ASSUMPSIT.—*Held*, also, that if the important facts, showing the cause of action, were correctly set out, the declaration could not be objected to on general demurrer on account of its improper conclusion, that the plaintiff ought to recover the value of the lot in the new town.

SAME—ASSUMPSIT—CONSIDERATION.—*Held*, also, that the value of the lot in the old town, at a reasonable time before the passage of the statute for the re-location, was the real consideration that passed from the plaintiff for the lot in the new town; which consideration, with interest from the time the lot in the old town was relinquished to the county, was, in this case, the measure of damages.

SAME—MAY BE SUED.—The Board of Justices may be sued, in their corporate capacity, for any legal demand against the county.

SAME—REMOVAL OF COUNTY SEAT.—A seat of justice may be removed by statute, on such terms as the legislature deems reasonable; and the county, having accepted and acted on the statute, is bound to comply with the terms imposed on it by the statute.

PLEADING—SURPLUSAGE.—Whatever comes under a *videlicet*, if inconsistent with the precedent matter, may be rejected as surplusage.

DAMAGES—BREACH OF COVENANT.—On a covenant to convey real estate, as on a covenant of seisin, the measure of damages is, in the absence of fraud, the purchase-money and interest (*b*).

Quære, whether on the covenant of warranty, the value of the land at the time of eviction, or the purchase-money with interest, is the measure of damages.

ERROR to the Lawrence Circuit Court.—Assumpsit by Blackwell against The Board of Justices of Lawrence county. General demurrer to the declaration, and judgment for the defendant.

HOLMAN, J.—The first count in the declaration states, that by a certain act of the general assembly of [*144] the state of Indiana, *entitled an act appointing commissioners to re-locate the seat of justice of Lawrence county, approved the 9th of February, 1825, certain commissioners were appointed to meet on the second Monday in March, 1825, and re-locate said seat of justice with authority to procure a tract of land, on which to lay off a town, &c.; that the act provided that the agent of the county should lay off a town on said tract of land, similar, as nearly as might be, to the town of Palestine, the former seat of justice, and with a cor-

(*b*) Post, 274; 7 Ind. 450; 20 *Id.* 87.

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responding number of lots; that any person, who had purchased and paid for any lot or lots in the town of Palestine, should have the privilege of exchanging the same for lots correspondingly situated and numbered in the new town, by filing and acknowledging, before the recorder of the county, an application for such exchange, which should be entered of record by said recorder, and have the effect of a release of all the right and title of the applicant to the lot or lots in Palestine; and that it should be the duty of the agent of the county, on being presented with the recorder's certificate of the relinquishment and application, to give the applicant a deed for the lot or lots in the new town, which should correspond in number with the lot or lots so relinquished; provided the application for the exchange should be made within twelve months after said re-location. And the plaintiff avers, that the commissioners so appointed, did meet on the second Monday in March, 1825, and did procure a tract of land &c., and re-locate the seat of justice for said county thereon; that the agent of the county did lay off a town, &c., which is known by the name of Bedford, on a plan, similar as nearly as might be to the plan of Palestine, and with a corresponding number of lots; that the plaintiff, having purchased and paid for fractional lots numbered 35 and 36, and lot numbered 244, in the town of Palestine, for the sum of 500 dollars, and being thereof the lawful owner, did, within twelve months after the said re-location, to wit, on the 18th of March, 1826, apply for the exchange of said lots for others correspondingly situated in the town of Bedford, by filing and acknowledging an application for said exchange before the recorder of said county, which application was entered of record by said recorder, who certified that such relinquishment was made, and that the plaintiff claimed in lieu thereof lots correspondingly situated in

[*145] Bedford; that the plaintiff on the *9th of June, 1826, presented the said certificate to the agent of

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said county, and demanded of him a deed for said lots in Bedford; and that said agent refused and still does refuse to give any deed for those lots. The plaintiff in fact says that the county of Lawrence has not, nor ever had, any title to the said lots in the town of Bedford; that the said agent could not, and can not, make any deed for the same; and that, by reason of the premises, the county of Lawrence is indebted to him in the sum of 500 dollars, and being so indebted, then and there undertook and promised to pay him the same whenever thereto required.

The second count states, that whereas the county of Lawrence was indebted to the plaintiff in the further sum of 500 dollars, for so much money before that time had and received of the said plaintiff, by the said county at its request, for the use and benefit of the said plaintiff; and being so indebted promised to pay, &c.

A third count in an amended declaration, states that the said defendants, in consideration of the premises aforesaid, then and there undertook and faithfully promised to pay the said plaintiff, so much money as the said lots in the said town of Bedford were reasonably worth, whenever they should be thereto required; and that the said lots in Bedford were worth 500 dollars. Breach, non-payment.

Demurrer and judgment for the defendants.

The two first counts it is said are bad, because they rest on a promise and undertaking by the county of Lawrence; when, it is contended, a county, *eo nomine*, has no power to contract, and can not be charged in an action at law. There is much weight in this objection; but as it is not applicable to the third count, we deem its investigation unnecessary.

The third count charges that the defendants, the board of justices of Lawrence county, in consideration of the premises, promised to pay, &c. That the board of justices may be sued for any legal demand against the county, is settled by the act of assembly by which the

board was organized. R. C. 1824, p. 86. It is necessary, then, to inquire whether the plaintiff has made out such a demand as can be enforced against the board of justices. That this is a case of assumpsit is no valid objection. If there were any room to doubt, whether, [*146] on general *principles, the board of justices, as a corporation, are liable to an action of assumpsit, that doubt is entirely removed by the act of assembly organizing the board. That act provides, that in all cases where any person now has, or hereafter may have, any claim of any name or nature against any county, suit may be brought therefor, in any Court of law or equity, against such board of justices in their corporate capacity, and judgment and execution be had thereon as in other cases. The words here used, as to the claims that may be enforced against the board of justices, as the representatives of the county, are comprehensive, and include all such claims as can be sued for in actions of assumpsit only. No exception can, therefore, be taken to the form of the action.

But the plaintiff's claim is certainly peculiar. It arises under the conditions imposed by the legislature, in the act authorizing the re-location of the seat of justice of Lawrence county. The removal of a seat of justice is a subject of legislative discretion; and the legislature, in the exercise of this discretion, may impose such terms on the county as are deemed equitable: and, when the act of assembly has been accepted and acted under, as in this case, by the constituted authorities of the county, all the conditions and provisions in the act are obligatory on the county. The county of Lawrence, by accepting this act of assembly, so far as it establishes the town of Bedford as its seat of justice has, by its proper agents, agreed by implication to perform all the conditions consequent upon that event. Those conditions have, therefore, become as obligatory upon the county, as if they were the

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express stipulations of its constituted authorities. They form a valid contract on a valuable consideration.

Considering the proceedings under the act of assembly, as amounting to an implied contract by the board of justices, as the corporate organs of the county, with the plaintiff, that if he would, in a given time and specified manner, relinquish his lots in Palestine, they, through the agent of the county, would make him a deed for the lots similarly situated and numbered in Bedford,—there can be no doubt but that the plaintiff, if he has complied with the precedent conditions, is entitled to a deed for the lots in Bedford; and that a refusal on the part of the county agent to make him the deed, completes his right [*147] of *action against the defendants. Performance of all these conditions is averred in the declaration. It may be proper however to remark, that one provision in the act of assembly requires, that the application for the exchange of lots should be within twelve months of the re-location of the seat of justice. The commissioners, it is said, met for the purpose of re-locating the seat of justice on the second Monday in March, 1825, and did re-locate, &c. The whole business would seem to have been transacted on that day. And the plaintiff avers that he applied for the exchange of lots, within twelve months of the re-location; to wit, on the 18th of March, 1826. The date of the application here given, is more than twelve months after the meeting of the commissioners for the re-location. It is inconsistent with the preceding averment, and being under a videlicet must be rejected. So that taking the averments in the declaration as admitted by the demurrer, and the plaintiff's right of action is complete.

But, although the plaintiff has a cause of action, yet he has mistaken the rule by which the amount of his claim is to be estimated. The conclusion of the third count is, that the defendants, in consideration of the premises, promised to pay the plaintiff so much money as the

lots in the town of Bedford were worth; averring that they were worth 500 dollars. As the promise of the defendants arises by implication of law, they can not be said to have promised anything but that to which the plaintiff is entitled by law. Here arises a question of some general importance: What is the measure of the damages to which the plaintiff is entitled? The question has been frequently agitated, whether the vendor of real estate, who can not make a title, or who makes a title that afterwards proves defective, is bound to remunerate the vendee with the value of the land, or with the purchase-money and interest.

Where a title is made that afterwards proves defective, a distinction has been sometimes drawn, between the measure of damages in covenants of warranty and in covenants of seisin. In Massachusetts, Connecticut, and South Carolina, the measure of damages in covenants of warranty, is the value of the land at the time of the eviction. *Gore v. Brazier*, 3 Mass. R. 543; *Horsford v. Wright*, Kirby, 3; *Liber v. Parsons*, 1 Bay, 19; *Guerard v. Rivers*, id. 265. In New York, Virginia, *Pennsylvania, and Kentucky, the measure of damages in such cases, is the purchase-money and interest. *Staats v. Ten Eyck*, 3 Caines, 111; *Pitcher v. Livingston*, 4 Johns. R. 1; *Lowther v. The Commonwealth*, 1 H. & M. 201; *Nelson v. Matthews*, 2 H. & M. 164; *Bender v. Fromberger*, 4 Dall. 436; *Harland v. Eastland*, Hard. 590; *Cox v. Strode*, 2 Bibb, 273; *Cosby v. West*, id. 568; *Booker v. Bell*, 3 Bibb, 173. The same doctrine is supported by the cases of *Morris v. Phelps*, 5 Johns. R. 49; *Caulkins v. Harris*, 9 Johns. R. 324; *Bennet v. Jenkins*, 13 Johns. R. 50; *Davis v. Hall*, 2 Bibb, 590. But in covenants of seisin the decisions have been uniform, that the purchase-money and interest is the measure of damages. This rule is either directly or indirectly recognized in all the foregoing cases. See, also, the cases of *Marston v. Hobbs*, 2 Mass. R. 433; *Bickford v. Page*, id. 455. When there is a covenant to con-

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vey, and an inability to perform, unless the inability arises from fraud in the covenantor, the measure of damages is the same as in covenants of seisin. The reason that runs through all the cases of covenants of seisin, applies with full force to covenants to convey. See, also the cases of *Rutledge v. Lawrence*, 1 Marsh. 396; *Rankin v. Maxwell*, 2 Marsh. 488,—and the above cases of *Cox v. Strode*, and *Davis v. Hall*,—where this rule is expressly recognized. We therefore consider it to be well settled, that in a breach of contract to convey, the measure of damages is the consideration, or purchase-money, with interest.

Assuming the position, that the consideration given for these lots in Bedford, with interest thereon, is the measure of the plaintiff's damages we find another question that is peculiar to this case, viz., What was this consideration? It was not, as the plaintiff's counsel supposes, the original purchase-money of the lots in Palestine. That money was not given for the lots in Bedford. Besides, the value of the lots in Palestine may have undergone a material change, between the time of the original purchase, and the time when the exchange was first contemplated. If the exchange had been made, as in ordinary cases, the consideration would have been, the value of the lots in Palestine at the time they were relinquished. But it does not seem equitable, in this case, to fix on that as the time at which their value should be estimated; inasmuch as the removal of the seat [*149] of justice may have occasioned a depreciation in their value. Even the passage of the act of assembly on that subject, must have had some effect in lessening their value. So that we are of opinion, that the value of the plaintiff's lots in Palestine, at a reasonable time prior to the passage of the act of assembly for the re-location of the seat of justice, is the real consideration that passed from the plaintiff, which, with interest thereon from the time of the relinquishment, is the proper measure of damages in this case.

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From this view of the subject, it is evident that the plaintiff has mistaken the measure of damages to which he is entitled. But this does not materially affect the declaration. The important facts that show what the plaintiff's demand really is, are correctly set forth. The balance of the declaration is the conclusion of the law on this statement of facts. It is all mere formality; and a mistake in this matter of form can not be taken advantage of on a general demurrer. The demurrer to the declaration should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with directions to permit the demurrer to be withdrawn, &c.

Naylor and Dewey, for the plaintiff.

Nelson, for the defendants.

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CONTRACT—CONDITION—PERFORMANCE—TENDER.—In an action on a contract in which something is to be done by the plaintiff, on condition of which the defendant undertakes to pay, the plaintiff in his declaration must aver a performance or a readiness to perform on his part. But the want of such an averment must be taken advantage of by demurrer; or, if the judgment be by default, by motion in arrest (*a*).

SAME—ORDER OF PROOF—PRACTICE.—The plaintiff, in such an action, can not be obliged to prove performance of his part of the contract, before he has proved the existence of the contract itself.

APPEAL from the Vermillion Circuit Court.—This was an action of assumpsit by Justice against The Board of Justices of Vermillion county. Plea, the general issue. Verdict and judgment for the defendants.

SCOTT, J.—The appellant, who was plaintiff below, states in *his declaration that the board of county commissioners, at their May session, made

(*a*) 41 Ind. 165; 57 *Id.* 393; 56 *Id.* 594; 24 *Id.* 377; 55 *Id.* 161; 55 *Id.* 475.

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a plan of a temporary court-house for the said county, and agreed with him that he should be the undertaker of the building, on his entering into bond with surety for the faithful performance of the contract, on or before the first day of November following; for which services he was to receive of the said commissioners the sum of 345 dollars. He then goes on to state that, afterwards, to wit, on the — day of May aforesaid, at the county aforesaid, in consideration thereof, (alluding to the aforesaid agreement,) and that the said plaintiff, at the special instance and request of the said commissioners, had then and there undertaken and faithfully promised the said commissioners to perform and fulfill the said agreement, in all things on his part and behalf to be performed and fulfilled, they the said commissioners undertook, and then and there faithfully promised the said plaintiff, to perform and fulfill the said agreement in all things on their part to be performed and fulfilled. He avers that he built the house according to the plan prescribed, and within the time specified; and assigns the breach, that neither the board of commissioners, during their continuance in office, nor the board of justices to whom were transferred the powers and authority of the said commissioners, have paid the said sum, &c. Plea, non-assumpsit; and issue. The cause was tried by a jury; and there was a verdict and judgment for the defendants.

We are informed, by a bill of exceptions, that the defendants objected to the admission of any evidence, on the part of the plaintiff, of the contract in the declaration mentioned, until the plaintiff should prove that the bond in the said contract mentioned had been given by the plaintiff, or that the giving of the bond had been either prevented or expressly waived by the defendants. Whether the giving of the bond, mentioned in the declaration, is any part of the contract declared on, or is only set out as inducement, need not now be decided. Nor is it necessary at present to inquire whether the giving of a

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bond, where it is a part of the contract, is material to be averred after the completion of the work, to secure which was the sole object of the bond. Giving the defendants all they claim, as it respects the importance of giving bond and the necessity of that fact being averred [*151] in the declaration, neither the time nor *the manner of taking advantage of the defect could avail them in this case. Where the undertaking is founded on a contract in which something is to be done by the plaintiff, on condition of which the defendant undertakes to pay, it is necessary for the plaintiff in his declaration to aver a performance or a readiness to perform on his part. But the want of such an averment in the declaration, must be taken advantage of by demurrer; or, if the judgment be by default, by motion in arrest. 1 Esp. N. P. 129. *Collins v. Gibbs*, 2 Burr. 899. Here was an issue in fact for the jury to try. All the evidence ought to have relation to the issue; and all evidence pertinent to the issue ought to go to the jury. To require a party to prove performance of a contract, before he can be permitted to prove its existence, is, to say the least of it, a novel proceeding.

There is another bill of exceptions in the record; but it states no opinion of the Court to which exception is taken. For the reason already noticed the judgment must be reversed.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Dewey, for the appellant.

Judah, for the appellees.

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SCHOOL FUND—VIOLATIONS OF LIQUOR LAW.—The fine, on a conviction of retailing spirituous liquors without a license, belongs to the county for the purposes of education; but this circumstance need not be stated in the judgment.

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CRIMINAL PRACTICE—ENDORSEMENT OF INDICTMENT.—A judgment against a defendant, in a criminal cause, will not be reversed because the record does not show that the indictment was endorsed, “a true bill,” by the foreman of the grand jury (a).

LIQUOR LAW—VOID LICENSE.—A license, to retail spirituous liquors for three months, was granted by the board of county justices. The license, as appeared on its face, had been granted on the payment of *fifty cents*. Held, that, under the statute, no license to keep a tavern or to retail spirituous liquors, could be granted on the payment of a less sum than *five dollars*; and that, therefore, the license in this case was, *prima facie*, absolutely void.

JURY—PROVINCE OF.—The jury are the judges of the facts, both in civil and criminal cases; but they are not in either, the judges of the law. They are bound to find the law as it is propounded to them by the Court. [*152] They may, indeed, find a general verdict, including both the law and the facts; but if, in such verdict, they find the law contrary to the instructions of the Court, they thereby violate their oath (b).

EVIDENCE—COMPETENCY—QUESTION FOR THE COURT.—Whether evidence be competent or not, is always a question for the decision of the Court.

ERROR to the Morgan Circuit Court.

HOLMAN, J.—Indictment for retailing spirituous liquors without license. Plea, not guilty. On the trial, the defendant presented the following license, to wit: “State of Indiana, Morgan county, January term, 1827. Ordered by the board of county justices, that Silas Townsend be and he is hereby authorized to retail spirituous liquors, in Morgan county, for three months from the first day of January, 1827; the said Silas Townsend having paid the sum of fifty cents to the treasurer for the said term. Witness, George H. Buler, clk.” Which license, it is said, covered the time when the retailing of the spirituous liquors, charged in the indictment, was proved to have taken place. The counsel for the state objected to the admission of his license as evidence to the jury, and the Circuit Court sustained the objection and rejected the license; to which opinion of the Court the defendant excepted. The defendant moved the Court to instruct the jury, that they were the judges of the law and the fact

(a) 25 Ind. 415. (b) Overruled. 4 Blkf. 150; 10 Ind. 502-536.

in this case, and that the power of Courts in criminal cases is only advisory; which instructions the Court refused to give; but instructed the jury that it was their province, in criminal cases, to determine whether the facts, proved by the evidence, constitute an offence under the law, as it is propounded to them by the Court. The jury found the defendant guilty, and assessed his fine at two dollars; and the Court gave judgment, that the state of Indiana recover against the said defendant the sum of two dollars, by the jurors assessed, together with her costs.

It is here contended, that this judgment is erroneous because it does not state that the fine is for the use of the county seminary of Morgan county. That this fine when collected belongs to the county for the purposes of education, is not disputed; but the question is, whether it is material that this appropriation of it should appear in the judgment. The appropriation may or may not appear in the judgment, without affecting the right of [*153] the county; and, in the present form of the judgment, the right of the county is complete, without any additional appropriation.

Another point that presents but little difficulty may here be disposed of; that is, that this judgment is erroneous, because the record does not show that the indictment was endorsed, "a true bill," by the foreman of the grand jury. Had this objection been made in the Circuit Court, so that we should have known that the indictment had not this necessary endorsement, it would have become a material point in the case; but, presented as it is for the first time in this Court, it loses its importance, inasmuch as a complete record, conclusive as to every material fact in the case, may be made up without it.

A question of some importance and difficulty is presented by the refusal of the Circuit Court to admit the defendant's license to be read as evidence to the jury. The act to license and regulate taverns, approved the 20th

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of January, 1824, R. C. 1824, p. 406, provides, in the first section, that the county commissioners (whose powers the board of county justices now possesses,) are authorized to license, as retailers of spirituous liquors, any persons who apply therefor; but shall not grant such license, unless the person applying shall produce the certificate of twelve householders that he is of good moral character, and that it would be for the benefit of travelers if he was so licensed; nor unless he shall give bond to keep good order in his house. The second section requires, that the person so licensed shall constantly keep the bedding, stabling, and other accommodations, necessary for the convenience of travelers. In the third section it is enacted, that no person shall obtain license, as a retailer of spirituous liquors, until he shall pay to the county treasurer the amount required by law for such license; nor shall any license continue for more than one year. By an amendatory act, approved the 12th of February, 1825, it is enacted, that when any person shall make application, under the provisions of the act to which this is an amendment, for a license to keep a tavern, he shall produce a certificate of twenty-four householders, &c. The act then proceeds to make some further additional regulations, as to the house, stable, bedding, &c., that he shall possess. Stat. 1825, p. 99. The act respecting the revenue, approved the 30th of January, 1824, R. C. 1824, p. [*154] 339, provides, that the amount required for a *license, to retail spirituous liquors, shall not be less than five, nor more than twenty-five dollars. It was under these acts of assembly that this license was granted.

From the whole phraseology of these two acts regulating taverns, it would seem that the legislature considered that a license to retail spirituous liquors, and a license to keep a tavern, mean the same thing. Without this construction of their language, there would be some confusion on the subject; but with this construction the whole subject is plain. The same pre-requisites are required of

him who would obtain a license to retail spirituous liquors, as of him who would obtain a license to keep a tavern; and a license to retail spirituous liquors, is a license to keep a tavern, and so *vice versa*; and it must be in this light that, we consider, the license to retail spirituous liquors was presented as a defence in this case. When we consider the nature of the act for which this license is required, we shall find it necessary to give the legislative provisions on the subject a strict construction. It has long been seen, that the practice of retailing spirituous liquors is productive of serious evils to the community; it has therefore long been a subject of legislative interference. The general assembly has, from time to time, adopted measures to repress this growing evil, and to confine it in as narrow bounds as seemed to be consistent with the real or imaginary rights of individuals. Therefore, every pre-requisite for the granting of a license for this purpose should be strictly and rigidly required. If we consider such a license in regard to the effect it has upon the accommodation of travelers, we shall find reasons for the same strictness of construction. One of the pre-requisites to the granting of such a license, to wit, the payment of the sum required by law, has another reason why it should be strictly construed, because it is in aid of the public revenue of the county.

What, then, is the effect of a license granted without these pre-requisites? How is it to be known, whether these pre-requisites have been complied with or not? What tribunal has authority to inquire into the proceedings of the board of justices on this subject? These questions are of importance; but they are in some measure solved, by considering that the justices acted ministerially, and not judicially in this matter. The

[*155] *only questions that can arise, are on plain matters of fact relative to the performance of the pre-requisites. Whosoever performs the pre-requisites is entitled to the license; and there is no case where the

pre-requisites, or any of them, can be dispensed with. There is no room for discretion, except in the amount at which the license shall be granted, and then the range of discretion is only between five, and twenty-five dollars. If the act of granting a license is in its nature a ministerial act, every tribunal, and every individual who is affected by it, may examine into the grounds on which it has been granted; and if it is found that it was granted contrary to law, it may be treated as absolutely void. If it were otherwise, it would place the justices, in this matter, superior to the law; and the acts of assembly to them would only be directory, and could not be rendered imperative, as there is no appeal from their order. There is no ground on which to consider this act of theirs as only voidable, and therefore good until it is set aside, as there is no provision made for reviewing it. It must, therefore, be absolutely void, or unquestionably valid; and surely the legislature never intended to sanction the idea, that justices might do just as they pleased in granting tavern licenses; and that no one should question the validity of their acts. It is a general rule in England to admit a person to show that he is not within the scope of the bankrupt laws, although the authorized commissioners have declared him a bankrupt. 1 Stark. Ev. 253. In *Crepps v. Durden*, Cowp. 640, it was held to be a sufficient answer, in an action of trespass, to a conviction for carrying on a trade, that the justices had no jurisdiction. The same rule holds as to an order of removal by the justices. 1 Stark. Ev. 253. We, therefore, unhesitatingly decide, that a license granted without the statutory pre-requisites is absolutely void; and that any tribunal that has to act upon it, may declare it so.

It is unnecessary to inquire how it is to be known, whether these pre-requisites have been complied with or not; for in this case the license shows on its face, at least presents strong un rebutted evidence of the fact, that it was granted without the payment of the sum required by law.

It is granted for the sum of fifty cents, when five dollars is the lowest sum for such a license. This license, [*156] it is true, is for but three months; but *the revenue law has made no division of time, in fixing the amount to be paid for such a license. It can not be granted for more than one year, but there is nothing to prohibit the granting of it for a shorter time; but the law is imperative, without any regard to time, that it shall not be granted for a less sum than five dollars. If, in this case, the holder of the license actually paid the full amount required by law, it lay upon him to show it, as the license presented by him was, at least, *prima facie* evidence to the contrary. In granting this license for the sum of fifty cents, the board of justices have undertaken to exercise their discretion, where no discretionary powers were given by the legislature; the license was therefore granted without authority. The defendant himself has shown that he was not entitled to it; and he can not screen himself from the penalty of the law, under a license which, he must be presumed to have known, was granted to him in violation of the law. This license being out of the pale of the law is of no more force than if granted by a private individual. It was therefore within the province of the Circuit Court, on inspection, to know, and determine, that it was granted without authority, and constituted no defence to the indictment. That Court properly excluded it from the jury.

The direction of the Circuit Court to the jury, that it was not the province of the jury to determine the law, is assigned for error with some degree of confidence. As this presents a question that has been frequently agitated in this state, we have devoted considerable time to its examination. It would seem that the counsel who moved for this direction of the Court, supposed that the jury possessed more extensive powers in criminal than in civil cases, and therefore treat this as a criminal case, in order to secure to the defendant the full extent of a discretion-

ary power in the jury. Although misdemeanors of this kind are sometimes, in general terms, classed among criminal cases, yet, in every material feature, they are more nearly assimilated to civil cases than to criminal; but we have been able to find no material distinction between civil and criminal cases, as it regards the province of the jury. The powers and the duties of juries are the same, except where, under peculiar circumstances, their powers are enlarged and extended. It has been frequent-
[*157] ly contended, that the jury have a right to *determine the law as well as the fact; but we have never met with a single principle of law that supports the position; nor a single decided case of any respectability that sanctions such a principle. In this case the 10th sec. of the 1st art. of the constitution, is urged as supporting the position. That section provides, that in indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the Court, as in other cases. This provision in the constitution seems utterly to defeat the purposes for which it was introduced; and to present a conclusive argument against the existence of a general right in the jury to determine the law in all cases. Admitting that it gives the right contended for, in the case of libels, does it give that right in any other cases? And if that right previously existed in all cases, why make this provision in the case of libels? The adoption of this provision, by the framers of the constitution, is therefore the expression of an opinion that no such general right existed; and the adoption of it in cases of libels only is conclusive that they did not intend to extend it to any other cases. The expression of the one excludes the others. So that, if this question depended solely upon this part of the constitution, it would be decisive against the general right of juries to determine questions of law. Previously to the formation of our constitution, there had been a violent struggle in England, between the subjects and the crown, on the doc-

trine of libels; in which the oppressive power of the crown, enforced by the Courts of justice, rendered it a matter of high importance, that in state prosecutions for libels, the jury should determine the law as well as the facts. This was seen and known by the framers of our constitution, and this provision may have been made to prevent the occurrence of such a state of things in this state. But it was not thought necessary to extend this right of juries to any other cases. So that all other cases are left as they were before. We shall therefore examine into the general province of juries, as to questions of law, leaving the case of libels where they are placed by the constitution.

The maxim, *ad questionem juris non respondent juratores*, seems to be as old as the common law. See Co. Litt. 155, 156.—Foster's Crown Law, 255, 256. It had the same origin with the maxim, *ad questionem facti non respondent judices*. These *two maxims divide and designate the powers of Courts and juries. To Courts are assigned all questions of law; to juries all questions of fact. This distinction in the powers of the two tribunals, runs through all the books and cases on the subject. In no case can the Court decide upon an issue in fact, unless by express statutory provision; nor can the jury in any case determine an issue of law. The Court must take the facts to be, as found by the jury; and the jury must yield to the law as delivered by the Court. It is true, that the Court has the power to set aside a verdict found contrary to the facts established by the evidence, but it can not determine the facts to be different, but must submit the case to another jury; and the jury, if they are unwilling to sanction the law as delivered by the Court, may find the facts specially, and leave to the Court the responsibility of determining the law. This distinction, between the province of the Court and of the jury, runs through the whole system of our jurisprudence. When an issue in law is formed, the jury

have nothing to do with it. When any matter of law is pleaded, it concludes to the Court, and not to the country or jury. Whenever the facts in a case are admitted, a jury is unnecessary; unless it is to find the consequences of the facts, as in cases of damages, which depend almost exclusively upon facts. Juries are generally sworn to try issues, or inquire of damages; and their oaths require them to give their verdict according to evidence; and as evidence proper for a jury, applies exclusively to facts, and never applies to the law, the oaths of the jurors necessarily limit them to the finding of facts.

If juries were authorized to determine matters of law, their rules of decision, and consequently the rights of individuals, would necessarily be uncertain and fluctuating. They neither have, nor are presumed to have, a competent knowledge to decide according to any settled principles; and being so frequently succeeded by each other, it would be impossible, in any future time, to establish any permanent rules of decision. If the Court decide contrary to law, the decision may be corrected in an appellate tribunal, and no matter how often an erroneous decision may be made in the same case, it can be as often set right by a reversal of the judgment. If the jury may

decide the law, the Court, it is true, may set aside [*159] the verdict; but as *only two new trials can be granted to the same party, if three successive juries concur in an erroneous verdict, the evil is without a remedy. The most important controversies might thus be determined, contrary to the plainest principles of law, without a possibility of redress. Thus the rights of individuals might be destroyed by the decision of men who were never presumed to know the law; and that, too, in the presence of a competent tribunal, fully aware of the injustice that was done, but without the power to prevent it. If the jury have a right to find a verdict contrary to the direction of the Court, it would not only render the rules of decision uncertain, and the rights of individuals

precarious, but it would also prostrate the dignity of the Court; and would ultimately effect a material change, if not the destruction of this branch of the government. But the organization of our Courts, the system of pleading, and the rules of admitting evidence, all go to show that the jury do not possess this right.

The misapprehension of the province of the jury, as to questions of law, has principally arisen from the fact that they may find a general verdict; which involves the law with the facts; and, in finding such a verdict, they may decide the law to be different from what the Court has determined it to be. This they can do, but it is classed by all writers on the subject among their powers of doing wrong. It is a violation of their oaths; and surely the question is not, how illegally a jury may act, but what is the proper sphere of their action. It is the duty of the Court to determine the law, and the presumption is that it determines it correctly; if the jury have a right to find the law to be otherwise, it would necessarily follow, that they have a right to determine the law to be what it is not. Besides, if the jury find the law contrary to the direction of the Court, the Court is bound to set aside the verdict; and it would seem strange, that the jury have a right to do what the Court is bound to undo. The duty of the Court is altogether different in this case, from the case of a verdict contrary to evidence. There the Court exercises a discretion in setting aside a verdict, but here its duty to set aside the verdict is imperative. The limitation of the power of the Court as to granting new trials, after two verdicts for the same party in a civil case, or

after a verdict for the defendant in a criminal [*160] case, has nothing to do *with the general principle. This limitation was made, in the one case, to put an end to litigation: and, in the other, in favor of life and liberty: and was not intended to enlarge the province of juries. The privilege granted to juries of finding a general verdict, can not be construed into an

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authority to find the law contrary to the direction of the Court. This clearly appears from what is said of their liability to punishment, if they find a verdict contrary to law. Sir William Blackstone, in treating of the duties of juries in giving their verdict in criminal cases, which, he observes, may be either general or special, says, "they may set forth the facts of the case, and pray the judgment of the Court as to the law, where they doubt the matter of law, and therefore choose to leave it to the determination of the Court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attainit." 4 Bl. Comm. 361. Thus it appears to us to be clear, that although the jury has an unquestionable right to find a general verdict, and in that verdict they may, if they choose to violate their oaths, find contrary to law, or contrary to the direction of the Court, yet in so doing they have passed the proper boundary of their duty. This subject was thus viewed by Judge Addison. In his charges to grand juries at the close of his Reports, page 62, he remarks, that strictly and properly it belongs only to Courts to decide all questions of law; but whenever in any issue, the law is involved in the fact, the jury may decide both by a general verdict, but the doctrine of attainits, and of new trials, proves that they do this at their peril, and under the control of the Court.

It is laid down by Hawkins, that if it shall plainly appear that the jury are perfectly satisfied of the truth of a fact, and the Court directly tells them, upon the fact so found, the judgment of the law is such, or such, and therefore they ought to give their verdict accordingly, yet they obstinately insist upon a verdict contrary to such directions; it seems agreeable to the general reason of the law, that the jurors are finable by the Court, unless

an attaint lies against them; for otherwise they would not be punishable for so palpable a partiality, in [*161] taking *upon them to judge of matters of law, with which they have nothing to do, and of which they are presumed to be ignorant, contrary to the express direction of one who by the law is appointed to direct them in such matters, and is to be presumed of ability to do it. 2 Hawks. P. C. 148; 3 Bac. Abr. 783, 784, 785. Lord Hale, although he contends against the doctrine of fining jurors for giving a verdict against the direction of the Court, except in the King's Bench, yet clearly maintains our position, that juries have nothing to do with matters of law, and are not authorized in finding the law contrary to the direction of the Court. 2 Hale's P. C. 160, 161, 311, 313. The cases of *Pennsylvania v. Bell*, Addison, 156, and *Pennsylvania v. M'Fall*, id. 255, support the same doctrine. These were both capital cases, and the juries were expressly charged, that it was their province to find the facts only, and that they had nothing to do with questions of law, which were to be determined by the Court. In the first of these cases, the language of Judge Addison is peculiarly strong. "The laws," says he, "must operate by certain rules, not the casual feelings of jurors; and jurors must judge of the facts according to certain rules of law; for miserable would be our situation, if our lives depended not on fixed rules, but on the feelings which might happen to be excited in the jurors who were to try us. I therefore know of no argument less proper, or more dangerous, or to which juries ought to listen with greater suspicion and aversion, than that which must derive its force from confounding the authority of a Court and a jury; instilling into the one a prejudice against the opinion of the other; and persuading jurors that they are at liberty to apply to facts a rule of their own, different from that which the law applies. The Court is the mouth of the law. Whether the facts are so, or so, it lies with you to deter-

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mine, according as you believe the testimony; leaving it to the Court to pronounce the construction, which the law puts on the facts so found; but you can not, but at the peril of a violation of duty, believing the facts, say that they are not what the law declares them to be; for this would be taking upon you to make the law, which is the province of the legislature, or to construe the law, which is the province of the Court." Judge Addison has also in his charges to grand juries, pp. 53 to 63, entered at full length upon the constitutional authority [*162] of Courts and juries, and has shown by a *train of arguments, not only that juries are limited to matters of fact, but also that it is important to the permanency of our civil institutions, that this limitation should be strictly observed.

Thus, from all that we have seen or heard on this question, we are prepared to say without hesitation, that the instruction of the Circuit Court was correct.

But, before we dismiss this case, we will notice another feature in it that is not unworthy of attention, as it is predicated on a supposed right in the jury to determine other questions of law, besides those involved in the facts put in issue. The defendant was indicted for retailing spirituous liquors without license. It seems, by a bill of exceptions, to be admitted that the fact of retailing spirituous liquors was proved; but he presented a license in his defence, which was rejected by the Court. Now the only question of law that conjecture can raise, which the defendant required to be submitted to the jury, must have been whether this license, so rejected by the Court, was legal evidence and formed a justification for the defendant. If this supposition is correct, and from all that we can discover from the record we have no doubt but that it is, the defendant requests the acknowledgment of a right in the jury, which we presume has never before been contended for: a right to determine, not only the law involved in the facts submitted to them, but to determine

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questions of law as to the competency and admissibility of evidence, which have been expressly excluded from their consideration, by the decision of the Court. If juries were recognized as possessing such a right as this, it would immediately prostrate the power of the Court, and overturn every legal method of arriving at facts, besides destroying the permanency of the principles of law involved in the facts. We can not but think that a calm consideration of the consequences of such a course of proceeding, would so alarm its most strenuous advocates, as to induce them to abandon it.

BLACKFORD, J.—I can not agree to a part of the opinion of the Court which has just been delivered. I object to that part of it which states, that the jury have not a right, if they please, to determine the law, as well as the facts proved; and also to that part of it which considers, that, if the jury find a verdict contrary to the instructions of the Court, as to the law applicable to the evidence submitted to them, they thereby violate their [*163] oath. *I conceive that the acknowledged right of the jury to find a general verdict, necessarily includes their right of deciding, if they choose, both the law and the facts with which the cause is connected; and that although the opinion of the Court, on the questions of law applicable to the facts proved, is entitled to great deference and respect from the jury, it is not absolutely *compulsory* upon them. I entirely agree with my brethren that it is the right and the duty of the Court to grant a new trial, if the verdict be contrary to law; and that the Court has the exclusive right to decide on the competency of evidence.

Per Curiam.—The judgment is affirmed with costs. To be certified, &c.

Wick, for the plaintiff.

Whitcomb, for the state

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TRESPASS—JUSTIFICATION—DEFENCE.—It is sufficient for a plea of justification in trespass, to justify that which is the gist of the action: matters merely in aggravation need not be answered.

MILITARY LAW—MILITIA FINES—EXECUTION.—An alias or pluries list of militia fines may be issued by the judge advocate against the delinquents, whether they be persons conscientiously scrupulous of bearing arms or not; and it is not necessary for such list to be, like an execution, in the name of the state.

TRESPASS—JUSTIFICATION—PLEADING—VENUE.—A plea of justification in trespass, can not be objected to for the want of a venue; the place being laid in the declaration, and the trespass justified being alleged to be the same with that complained of.

ARREST—JUSTIFICATION—PLEADING.—If A. and B. justify in trespass, as sheriff and deputy sheriff, under an alias list of militia fines issued by a judge advocate, the plea must show which of the defendants is the sheriff and which the deputy.

APPEAL from the Henry Circuit Court.

BLACKFORD, J.—This was an action of trespass. The declaration contains two counts. The first for breaking and entering the plaintiff's close, situate in the county of Henry, and taking away his mare, and converting her to his own use. The second, for breaking and entering the plaintiff's dwelling house, situate in the county of Henry, and breaking his clock.

Two of the defendants, Leavell and Forkner, pleaded in justification, that the plaintiff, conscientiously scrupulous of bearing arms, was, on, &c., at, &c., by a Court of assessment, adjudged to pay two dollars and a [*164] half as an equivalent for not *performing militia duty in the year 1825; that, on, &c., at, &c., the judge advocate laid before the Court of appeals the assessment against the plaintiff, which was not remitted; that, on, &c., the judge advocate made out a list of the fine against the plaintiff, which list was signed and sealed by the senior officer of the Court of appeals, and delivered to the sheriff of said county of Henry, where the

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plaintiff resided, who, on, &c., returned the list to the paymaster, with an endorsement that the same had not been collected; that the judge advocate, on being notified by the paymaster of this return, made out an alias list of the fine, and then and there, to wit, on, &c., delivered the same to these defendants, sheriff and deputy sheriff of the said county of Henry, to be collected; that before this alias list was returnable, the defendants, with the said list, entered the dwelling house of the plaintiff, the door being open, to levy the amount, using no unnecessary force; that not finding goods there on which to levy, they entered the plaintiff's close, and then and there, with the said list, levied on the mare to satisfy the fine and costs, and took her into possession, using no unnecessary force; that by virtue of said list, on, &c., at, &c., and before the same was returnable, the defendants sold the mare, after due notice, at public vendue, for the purpose aforesaid, the proceeds of which, the fine and costs being deducted, the plaintiff refused to accept, and the defendants paid the same into the treasury of the said county of Henry; and that the trespasses justified are the same with those complained of.

The other defendant, Boggs, besides the general issue, pleaded a justification similar to that of his co-defendants, with the exception that he states his having acted not as an officer, but in aid of Leavell, the sheriff, and in obedience to his command.

To the plea of Leavell and Forkner, the plaintiff demurred specially for the following causes: 1st, the plea does not answer the trespass charged as to the house and clock; 2d, the plea shows that the fine was against the plaintiff, as one conscientiously scrupulous of bearing arms; and that the alias list was not signed, sealed, and delivered, by the senior officer of the Court of appeals, without which it was void; 3d, the plea shows that the property was taken on an alias list of fines, which could not issue in this case; 4th, it does not appear that the

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process was in the name of the state; 5th, it does [*165] *not appear that the levy was made in the county, or whilst the defendants were the sheriff and deputy; 6th, it does not appear which of the defendants justifies as sheriff, and which as deputy. The plaintiff also demurred specially to the plea of Boggs, and assigned for cause, the first four objections taken to the other plea. All the defendants joined in demurrer, and the Circuit Court gave judgment in their favor.

There is nothing in the first objection. Entering into the dwelling house, breaking the close, and taking the plaintiff's mare, constitute the gist of the trespass alleged; and these, the defendants undertake to justify: breaking the clock is merely a matter of aggravation, and need not be answered by the plea. *Taylor v. Cole*, 3 T. R. 292.

The second objection is also untenable. The words of the militia law of 1824, section 47, are express, that if the money be not made on the first list, the judge advocate, on being notified thereof by the paymaster, shall issue an alias or pluries list of the uncollected fines. The law requires the first list to be signed and sealed by the senior officer; but, in so many words, authorizes the judge advocate himself to issue the subsequent ones.

As to the third objection, we are clearly of opinion, that the provision in the section of the militia law referred to, which requires the judge advocate to issue an alias or a pluries list, extends to the cases of fines against persons conscientiously scrupulous of bearing arms, as well as to all others. That is, obviously, the intention of the statute, and we can find nothing in the letter to warrant any other construction.

The fourth objection, that the list is not, like executions of fieri facias, &c., in the name of the state, can not be supported. It is plain, that the form contended for is not within the intention of the statute. By the words, *a list of fines*, can not be meant a formal execution, running in the name of the state. The objection, therefore, de-

pende on the unconstitutionality of the law. The clause in the constitution saying, "the style of all process shall be, *The State of Indiana*," found in the 5th article, which relates to the judiciary department of the government, has no relation to the manner of collecting militia fines. There is a section in the seventh article, relative to these fines as to the conscientious persons, which requires that they shall be collected *by a civil officer; but it says nothing as to the form of the process,—leaving that, as we conceive, to legislative discretion.

That part of the fifth objection to this plea, which relates to the want of a venue, is answered by observing that the place is laid in the declaration, and it was not necessary to repeat it in a justification of the trespass, alleged to be the same with that complained of. As to the other part of this objection, though the statement of the fact said to be omitted, is not as explicit as it might be, we think that the defect is rather too slight to authorize a reversal of the judgment on that ground.

The last cause of demurrer to this plea is fatal; and the plaintiff was entitled on it to the judgment of the Court. The defendants, Leavell and Forkner, justify as sheriff and deputy sheriff, but do not designate in their plea which of them is the one, or which the other. It is impossible that this can be correct. The plaintiff has a right to know from the plea, which particular defendant it is that justifies as the sheriff; and, also, which one it is that justifies as the deputy sheriff. The plaintiff, for example, might wish to deny that the person is sheriff, who justifies in that character; but in this case he could not do so without averring that neither of these two defendants was the sheriff. That would surely be subjecting him to more than the law requires.

The special plea of Boggs is a bar of the suit as to him. The causes of demurrer to his plea have been shown to be insufficient; and it is in other respects substantially good.

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Per Curiam.—The judgment is reversed with costs Cause remanded to the Circuit Court, with directions to render judgment on the demurrer in favor of Boggs, and to permit the other defendants to withdraw their joinder in demurrer and amend their plea.

Sweetser and Smith, for the appellant.

Rariden, for the appellees.

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EVIDENCE—WEIGHT OF—REVIEW OF.—If any of the evidence, which is contradictory, conduce to prove the plaintiff's case, and he obtain a verdict, the refusal to grant to the defendant a new trial, on account of the insufficiency of the evidence, will not, except in extreme cases, be available in error. And where a new trial is applied for on account of excessive damages, and refused, the damages must be outrageously excessive or a Court of error will not interfere (a).

CONTRACT—PART PERFORMANCE—REMEDY.—In the case of a special contract, one party can not, by a part performance only of his part, sue for and recover, in indebitatus assumpsit, for the part he has performed. But if he perform a part of what he was to do, and be prevented from performing the residue by the conduct of the other party, he may abandon the contract and recover for what he has done. (b).

APPEAL from the Scott Circuit Court.—Indebitatus assumpsit for goods sold and delivered; a count on a quantum valebant; and one on an insimul computassent. Moore was the plaintiff below, and Hoagland, Hall, and Ballard, were the defendants. Plea, non-assumpsit. Verdict and judgment for the plaintiff.

HOLMAN, J.—This case was referred to arbitrators who made an award, which was afterwards set aside by the Circuit Court, but on what grounds does not appear. The presumption is that the Circuit Court acted correctly; so that it is now too late to suggest that this decision was

(a) 58 Ind. 431; 45 *Id.* 517, 148; 51 *Id.* 494; 57 *Id.* 121, 172, 314, 327. Sée 4 Ind. 79; 48 *Id.* 153. (b) Overruled 3 Ind. 59-72.

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erroneous, without showing in the record the grounds on which that suggestion is made. The plaintiff obtained a verdict for 60 dollars. The defendants moved for a new trial, which was refused and a bill of exceptions taken, in which the whole of the testimony is set forth; of which the following is the substance:

Abraham Poor stated, that he was present when a contract was entered into between the plaintiff and the defendants. The plaintiff agreed to sell the defendants 100 hogs and the corn in a certain crib, the quantity not known. The defendants were to pay 100 dollars for the hogs, and 50 cents per bushel for the corn. He heard something said between the parties about the payment of 20 dollars immediately, but did not recollect, particularly, what it was. Jane Calvin stated that she was present when the contract was made. The defendants were to

have the hogs for 100 dollars, and the corn in [*168] *the crib, supposed to be 200 bushels, for 50 cents per bushel. They were to pay 20 dollars immediately, and execute their notes for the balance payable

in one year. Polly Moore testified to the same facts. (She and Jane Calvin are daughters of the plaintiff.) Nathaniel Poor stated, that he was present when the hogs were delivered to the defendants; that there was a conversation about the obligations for the purchase-money, in which Hoagland observed that it was too late to execute the notes, to which the plaintiff made no reply. He heard nothing said at that time about money. Philip Ballard stated, that the hogs when delivered were very poor, and could scarcely walk; that shortly after the delivery of the hogs, and after the delivery of about 80 bushels of corn, he went with Hoagland to demand the balance of the corn; that the plaintiff's daughters were engaged in carrying corn out of the crib which the defendants were to have, and placing it in another; that these girls, who were the witnesses in this case, went into the house, and he saw them no more while he and Hoag-

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land remained at the plaintiff's; that a conversation between the plaintiff and Hoagland took place about four or five rods from the house; that Hoagland demanded the balance of the corn of the plaintiff, observing that he, the said plaintiff, knew that he was to let him, Hoagland, have 200 bushels of corn in said crib, or make up the deficiency in rye; that he, the said plaintiff, knew that the whole contract depended upon his, Hoagland's getting the corn; that if he could get the corn, he would comply with the contract on his part, by executing obligations, but if he could not get the corn, he would disannul the whole contract; all which was neither admitted nor denied by the plaintiff; that the plaintiff replied that he could not let him have the corn; Hoagland said that he would return the hogs; the plaintiff said he would not receive them; that the witness heard nothing said about money; that only two of the defendants were present, and no money or notes were tendered. Isaac Hoffman stated, that he assisted Hoagland in returning the hogs to the plaintiff's, but that the plaintiff would not receive them, but directed the witness to turn them out of his enclosure. Jane Calvin was re-examined and stated, that when Hoagland demanded the corn of her father, at the time spoken of by the witness, Ballard, she believed, but was not very positive, that her father [*169] said, that one reason why *he would not let the defendants have the corn was because they had not paid him the 20 dollars.

The Court instructed the jury, that if they found that the defendants had failed to comply with the contract on their part, and that that was the reason the plaintiff refused to comply, the plaintiff had a right to recover for so much of his property as the defendants had received on the contract; and that the plaintiff was not bound to comply on his part, after the defendants had so refused; and that if they found, that the defendants refused to pay the 20 dollars and to execute their notes, if the same were

by the contract to be done immediately, they should find for the plaintiff the value of the corn, if any was received by the defendants; unless they should find that the corn had been fed to the plaintiff's hogs, while in the defendant's possession; but that if the defendants had made use of the corn in feeding their own stock, they were liable for the value of it.

It is strongly insisted in this case that the evidence did not authorize the verdict; and that therefore a new trial ought to have been granted. On this subject we find it necessary to use extreme caution; as it is the exercise of a controlling power over the discretionary powers of the Circuit Court; and in cases where they generally have a far better opportunity of understanding the real justice of the case than we can possibly have. The right of a jury in estimating the weight of evidence, and the discretion of the Circuit Court in sustaining a verdict, suggested to be given against the weight of evidence, are matters with which this Court should not interfere, except on extraordinary occasions, where manifest injustice appears clearly to have been done. In this case there is contradictory evidence, which placed the credibility of the witnesses before the jury. With this we have nothing to do. When there is legal evidence that conduces to prove every material fact in a case, we must, except in extreme cases, leave the weight of that testimony with the jury, under the superintendence and control of the Court before which the testimony is given; and when that Court approves of the verdict, and refuses a new trial, there is no principle of jurisprudence that will require or permit an appellate Court to reverse the judgment. These remarks apply with their full force

[*170] to the amount of damages. It ought to be *a case of damages, excessively outrageous, to authorize this Court to reverse the judgment of the Circuit Court, for refusing to set aside the verdict. In this case, the weight of evidence appears to have been with the de-

fendants; but that alone is not sufficient to require a reversal of the judgment.

The instructions of the Circuit Court come next under consideration. It is a well settled principle, that, where there is a special contract, one party can not perform a part of the contract, and, before an entire performance, sue and recover in indebitatis assumpsit for the part he has performed. But it is a rule equally well settled, that if he has performed a part of the contract, and is prevented from completing it by the acts or the failure of the other party, he may abandon the contract and recover for what he has done. Testing these instructions, as to the plaintiff's right of action, by these rules, it is evident, in the language of the instructions, that, if the defendants failed to comply with the contract in the first instance, and if that was the reason why the plaintiff refused to comply on his part, he had a right to recover for so much of his property as the defendants had received, and had failed to return. Taking this as an entire contract for the corn and the hogs, and supposing, as the plaintiff's daughters testified, that the defendants were to pay to the plaintiff 20 dollars immediately, and to give their notes for the balance; now, if after the delivery of the hogs and a part of the corn, the plaintiff refused to deliver the balance of the corn, unless the 20 dollars were paid, and the defendants failed to pay it, the plaintiff would not be bound to deliver the balance of the corn; but might consider the special contract at an end, and recover the value of his property, so received and retained by the defendants. The evidence that the plaintiff gave the non-payment of the 20 dollars as a reason for not delivering the balance of the corn, appears to us as of a very doubtful character; but that does not affect the instructions of the Circuit Court. That Court could not say there was no evidence as to that fact; and surely it would not be expected that this Court would disregard this evidence, and treat these instructions as if no such fact appeared in the

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case. As this was a fact that the evidence conduced to establish, it was correct in the Circuit Court to inform the jury what the law was, if this fact should be found [*171] by them. This part of the *instructions must therefore be considered as unobjectionable. The balance of the instructions, as to the quantity of corn for which the plaintiff had a right to recover, if he could recover at all, is as favorable to the defendants as they could reasonably ask. If the plaintiff proved a right of action, he was certainly entitled to the value of the corn received by the defendants, unless that corn had been fed to his hogs, while they were in the possession of the defendants. If the defendants had made use of this corn for their own benefit, the plaintiff would be entitled to the value of it.

We are therefore of opinion, that, on both these points, the instructions of the Circuit Court were correct.

Per Curiam.—The judgment is affirmed, with 1 *per cent.* damages and costs.

Thompson and Nelson, for the appellant.

Farnham and Thornton, for the appellee.

CHINN v. RUSSELL, in Error.

COSTS—BOTH PARTIES—SUCCEED (a).

THE defendant in replevin avowed the taking of the goods, by virtue of his office as sheriff, on an execution against a third person to whom they belonged. The plaintiff pleaded property in himself. The jury found that some of the goods were the plaintiff's and that some were not his. Judgment on the verdict, and that each party should recover his costs. *Held*, that, as each party had succeeded, each was entitled to costs; and that the judgment was right. *Powell v. Hinsdale*, 5 Mass. 343.

(a) Post, 187, 267, 415.

Perkins and Another v. Smith, in Error.

PERKINS and Another v. SMITH, in Error.

BOND—BREACH OF—JUDGMENT—PRACTICE.

DEBT on a bond, and judgment by default. The plaintiff suggested, that the bond was conditioned for the delivery of property taken on execution, and assigned as a breach that the condition was broken. Judgment, without a jury, for the amount of the execution. [*172] *Held*, that, supposing the *assignment of the breach to be only informal, and the want of a judgment for the penalty to be unavailing in error, yet the breach should have been found, and the damages assessed, by a jury. R. C. 1824, p. 293; *Clark v. Goodwin*, 1 Blackf. 74 (1).

(1) *Gildewell v. M'Gaughly*, Nov. term, 1830, post; R. C. 1831, p. 404; *Morris v. Price*, Nov. term, 1831, post.

THOMASSON v. TUCKER's Administrators, in Error.

EVIDENCE—PLEADINGS OF CO-PARTIES.

THE answer of one defendant in chancery is no evidence against his co-defendant.

WEAVER v BRYAN, in Error.

JUDGMENT—RE-ENTERED—PRACTICE.

IN order to have a judgment re-entered, under the statute of 1827 relative to the burned records of Dearborn county, the notice to the defendant, which answers the purposes both of a writ and declaration, must state the term at which the judgment was originally rendered.

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FORMER RECOVERY—DIFFERENT PARTIES.—Goods found in possession of A., an execution-defendant, were levied on by the sheriff. B. claimed the goods as his, and a jury, summoned to try the right of property, found they belonged to A. *Held*, in replevin by B. against the sheriff, that the finding of the jury was not conclusive against B.

Quære, whether A.'s unconditional possession of goods, which had been sold by him to B., renders the sale *per se* fraudulent and void, or is only evidence of fraud, as to A.'s creditors.

REPLEVIN—RIGHT OF POSSESSION.—Replevin lies by a person not having the actual possession of the goods when taken, provided he have at the time the general property and the right of immediate possession (a).

SAME—RIGHT OF EXECUTION-DEFENDANT.—Any person, except the execution-defendant, may have replevin under our statute, for his goods taken in execution (b).

[*173] *APPEAL from the Marion Circuit Court.—

Replevin by W. S. Chinn against A. W. Russell. The defendant filed two avowries and one plea. The plaintiff pleaded to the avowries and replied to the plea. Demurrer to the plaintiff's pleas, and issue on his replication. Judgment on the demurrer for the defendant.

BLACKFORD, J.—This is an action of replevin. There are two avowries. The first states that Kinnard recovered a judgment against Thomas Chinn, and sued out an execution against his goods; that the defendant, as sheriff, by virtue of the execution, took the goods, they being in the actual possession of Thomas Chinn; that the present plaintiff and another person claimed the property, and the jury, summoned to try the right, found it to be in the plaintiff, but the Circuit Court, on appeal, determined the goods to belong to Thomas Chinn. The defendant also averred the property to be in Thomas Chinn. The second avowry is the same as the first, except that it says nothing as to the trial of the right of property. The defendant also pleads that the goods belong to Thomas Chinn, and not to the plaintiff. To the avowries, the

(b) 51 Ind. 1; 38 *Id.* 461

(b) 51 Ind. 395; 51 *Id.* 1; 38 *Id.* 461.

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plaintiff pleads that the goods are his; that Thomas Chinn had possession as his bailee; and that the plaintiff always had the right to reduce them into possession at any time. To the plea of property in another, the plaintiff replies property in himself. The defendant demurs to the pleas of the plaintiff, and joins issue on his replication.

It is contended, that the determination of the Court, as to the right of property, was a justification to the sheriff. This position can not be supported. We are not aware that these trials of the right of property have been ever held conclusive. If the goods be found to be the debtor's, the inquisition may show that the sheriff's conduct in selling was not malicious, but it is no bar to the action of the owner. *Townsend v. Phillips*, 10 Johns. R. 98 (1). It is also contended, that the plaintiff's permitting the goods to remain with Thomas Chinn was fraudulent, and rendered them subject to the execution. For this are cited, *Hamilton v. Russell*, 1 Cranch, 309, and *Sturterant v. Ballard*, 9 Johns. R. 337. These are cases of goods sold by the execution-defendant, where it was held, that the continuance of possession by the seller without condition, renders the sale void as to creditors. There [*174] are other cases, holding this *circumstance as only an evidence of fraud (2). The present case, however, is altogether different from those referred to; there being no pretence here that the plaintiff purchased the property of the execution-debtor; and the authorities cited have, therefore, no application.

The principal questions arising in this cause are these two: First, can a person, not having the actual possession of goods when taken, recover in replevin, provided he have the general property, and the right of immediate possession? secondly, can a person, not the execution-defendant, have replevin under our statute for goods taken in execution? Our opinion is in the affirmative on both these points. As to the first, it is evident from the cases of *Ward v. Macauley*, 4 T. R. 489, and *Putnam v.*

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Wyley, 8 Johns. R. 432, cited by the defendant himself, and *Gordon v. Harper*, 7 T. R. 9, that the plaintiff could recover, under these circumstances, in trover, or trespass *de bonis asportatis*. And we know of no ground, as respects this point, on which replevin can be distinguished from trover or trespass. As to the second question, we are of opinion that, let the common law be as it may, our statute authorizes the proceeding. According to the statute, whenever any person tortiously takes and unlawfully detains, or lawfully acquires and unlawfully detains, the goods of another, the owner may replevy. One exception is made, and no more; which is, that the law shall not extend to execution-defendants. R. C. 1824, p. 337. The case we are considering is one of taking and detaining without sufficient authority; and the plaintiff is not an execution-defendant: it is impossible, therefore, to say that the statute does not apply to it (3).

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the joinder in demurrer are set aside, with costs. Cause remanded, with directions to permit the appellee to withdraw his demurrer and reply to the pleas of the plaintiff.

Hurst and Gregg, for the appellant.

Fletcher and Brown, for the appellee.

(1) Sed vide R. C. 1831, pp. 237, 238. Vide, also, *Bosley v. Farquar* ante p. 61, and notes (1) and (2). 2 Tidd's Prac. 8th Lond. Ed. 1047.

(2) It has been a great question, whether the debtor's continuance [*175] in possession of *goods, after his sale of them to another, or to be considered *conclusive* or only *prima facie* evidence of fraud, as to creditors. That the evidence is *conclusive*, is decided not only by the cases named in the text, but by the previous one of *Edwards v. Harben*, 2 T. R. 587, and some others. There are many subsequent cases, however, holding the contrary opinion, which must be considered as having almost subverted the authority of those from which they differ. "The conclusion," says Chancellor KENT, "from the more recent English cases would seem to be, that though a continuance in possession by the vendor or mortgagor be *prima facie* a badge of fraud, if the chattels sold or mortgaged be transferable from hand to hand, yet the presumption of fraud arising from that circumstance, may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of the possession. The question of fraud arising in such cases, is not an absolute inference of law, but one of fact for a jury; and if the personal chattels savor of the realty, as, for instance, the engines, utensils, and machinery, belong-

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ing to a manufacturing establishment, no presumption of fraud will arise from the want of delivery." 2 Kent's Comm. 2 Ed. p. 520. Twyne's case is the leading one on this subject. 3 Co. Rep. 80. Vide, also, *Kidd v. Rawlinson*, 2 Bos. & Pull. 59; *Hoffman v. Pitt*, 5 Esp. R. 22; *Arundell v. Phipps*, 10 Ves. 139, 146, 147, 151; *Steel v. Brown*, 1 Taunt. 381; *Darson v. Wood*, 3 id. 256; *Watkins v. Birch*, 4 id. 823; *Reed v. Blades*, 5 id. 212; *Leonard v. Baker*, 1 Maule & Selw. 251; *Benton v. Thornhill*, 7 Taunt. 149; *Guthrie v. Wood*, 1 Stark. R. 367; *Jezeph v. Ingram*, 8 Taunt. 838; *Armstrong v. Baldock*, 1 Gow's R. 33; *Wooderman v. Baldock*, 8 Taunt. 676; *Stewart v. Lombe*, 1 Brod. & Bing. 506; *Storer v. Hunter*, 3 Barn. & Cress. 368; *Latimer v. Basten*, 4 id. 652; *Eastwood v. Brown, Ry. & Mood*, 312. In the case last cited, decided in 1825, ABBOTT, C. J. says: "I shall leave it to the jury to say, whether, under all the circumstances of this case, they are satisfied that the assignment was made with the design of delaying or defeating creditors in the recovery of their debts. I can not agree to the doctrine laid down in the case cited by Mr. Scarlett. [*Wordall v. Smith*, 1 Campb. 333.] The circumstance of an assignor who is under pecuniary embarrassments, remaining in possession of the property assigned, is always suspicious; but if it does not appear, from other facts in the case, that this takes place under a fraudulent arrangement between the parties, for the purpose of delaying creditors, I am of opinion that it is not of itself a *conclusive* badge of fraud. I have no doubt that a purchase of a house and furniture, with an immediate demise of that house and furniture to the vendor, may be good, if there be no intention to defeat or delay creditors by the transaction, and it is material that in this case it does not appear that any actions by other creditors had been brought."

That the continuance of possession is only *prima facie* evidence of fraud is the law in New York. *Barrow v. Paxton*, 5 Johns. R. 258; *Beal v. Guernsey*, 8 id. 452. It was, in *Sturtevant v. Ballard*, 9 Johns. R. 337, decided to be *conclusive*; but that case is overruled, and the doctrine of the previous decisions is adhered to. Vide *Butts v. Swartwood*, 2 Cowen, 431; *Bissell v. Hopkins*, 3 Cowen, 166 and note; *Jennings v. Carter*, 2 Wend. 449; *Diver v. M'Laughlin*, id. 596; *Hall v. Tuttle*, 8 id. 375.

The law in Massachusetts is like that in New York. *Brooks v. Powers*, 15 Mass. 244; *N. E. M. I. Co. v. Chandler*, 16 id. 279; *Bartlett v. Williams*, 1 Pick. 288; *Badlam v. Tucker*, id. 399; *Homes v. Crane*, 2 id. 607; *Wheeler v. Train*, 3 id. 255; *Ward v. Sumner*, 5 id. 59; *Shumway v. Rutter*, 7 id. 56; S. C. 8 id. 443.

In Pennsylvania the law is otherwise. There, the continuance of [*176] possession is *conclusive* evidence of fraud, and *per se* avoids the sale, as to creditors and purchasers. *Daves v. Cope*, 4 Binn. 258; *Clou v. Woods*, 5 S. & R. 278; *Babb v. Clemson*, 10 id. 419; *Shaw v. Levy*, 17 id. 99; *Hoyer v. Geesman*, id. 251.

Vide 2 Kent's Comm. 2d. ed. 512-532, where the reader may find a general review of the English and American decisions on this litigated subject. Vide, also, 2 Stark. Ev. 617, and note; Chitty on Contracts, 227, and note; Roscoe on Ev. 485; *Jordan v. Turner*, Nov. term, 1833, post. There is an English decision on this subject, as late as 1832, the substance of which is as follows: Want of possession accompanying a conveyance of chattels does not of itself constitute fraud; and avoid the deed as against creditors; it is only *evidence* (or as the cases term it, a *badge*) of fraud. And where a bill of sale of household furniture was given as a security for a *bona fide* advance of money, and provided that if the debtor should repay the money by installments, on certain days, the deed should be void, but in default of payment of any of the installments, the creditor might take possession and sell off the goods; and that *until such default*, the debtor might keep possession,—the deed was held not to be fraudulent as against a judgment-creditor by reason of the debtor's remaining in possession, being given for a good con-

sideration, and his continuance of possession being in terms provided for. (2 W. Bl. 701; 1 B. Moore, 189; 2 Marsh. 427. The dictum of BULLER, J., in *Edwards v. Harben*, 2 T. R. 587, was relied on *contra*;) *Martindale v. Booth*, 3 Barn. & Adol. 498; 9 Lond. Law Mag. 429.

(3) The statute of 1831 is the same with that of 1824 which is cited in the text. R. C. 1831, p. 424. Vide *Parsley v. Huston*, May term, 1834, post. It is said by Blackstone, that replevin lies *only* in the case of a wrongful distress. 3 Bl. Comm. 146. It has been since shown, however, that this is a mistake; and that replevin lies for any *tortious taking* of goods from the possession of the plaintiff. *Shannon v. Shannon*, 1 Sch. & Lef. 327; *Pangburn v. Patridge*, 7 Johns. R. 140. By the common law, there must be an actual and wrongful taking of the goods from the plaintiff to authorize the action of replevin. *Shannon v. Shannon*, *supra*; *Meany v. Head*, 1 Mason, 322; *Galloway v. Bird*, 4 Bing. 209. In some of the states, replevin lies in any case where one man claims goods which are in the possession of another *no matter how the latter's possession was obtained*. It is so in Pennsylvania. *Weaver v. Lawrence*, 1 Dall. 156; *Shearick v. Huber*, 6 Binn. 2; *Staughton v. Rappalo*, 3 S. & R. 562; *Keite v. Boyd*, 16 id. 300. So in Massachusetts. *Baker v. Fales*, 16 Mass. 147. So in Maine. *Seaver v. Dingley*, 4 Greenl. 315.

The following is a late decision in New York: Replevin against a sheriff. Avowry, that the defendant took the goods by virtue of an execution against G., they being found in G's possession. Demurrer to the avowry. *Per Curiam*.—"By the pleadings it is admitted that, at the time of the taking, the property was in the plaintiff, and the possession in Griswold, the defendant in the execution; and the question is, whether replevin lies? Since the case of *Pangburn v. Patridge*, 7 Johns. R. 140, it has been settled that replevin lies where trespass *de bonis asportatis* will lie. The plaintiff must have property general or special, and possession either actual or constructive. In *Thompson v. Button*, 14 Johns. R. 84, Chief Justice THOMPSON lays down the broad proposition, that as a general principle it is undoubtedly true that goods taken in execution are in the custody of the law, and can not be taken out of such custody when the officer has found them in, and taken them out of, the possession of the defendant in the execution. In *Clark v. Skimmer*, 20 Johns. R. 467, Mr. Justice PLATT has shown very conclusively, that that proposition is correct only as between the defendant in such execution and the officer; and in such a case, it was applied in *Gardner v. Campbell*, 15 Johns. R. 401. A variety of cases are stated by [*177] Mr. Justice *PLATT, in which an action of trespass would be a very inadequate remedy. The case of *Thompson v. Button*, was decided upon the principle of *Pangburn v. Patridge*, and was a case where the property taken by virtue of the execution was taken from the possession of the plaintiff in the replevin, and not from the possession of the defendant in the execution. The same principle laid down in *Pangburn v. Patridge* was recognized in the late cases of *Marshall v. Davis*, 1 Wend. 109, and *Hall v. Tuttle*, 2 id. 475. The plaintiff having the property in the goods in question, had the constructive possession; for the property draws to it the possession. The plaintiff therefore had the right to take possession at pleasure, and could have sustained trespass; and replevin and trespass in such cases are concurrent remedies. The plaintiff is entitled to judgment on the demurrer, with leave to the defendant to amend on payment of costs." *Dunham v. Wyckoff*, 3 Wend. 280.

In Massachusetts, by statute, replevin lies for goods attached on mesne process or taken in execution, provided the debtor in the original suit is not the plaintiff in replevin. Therefore, if A's goods are taken in execution for B's debt, A. may maintain replevin against the officer. Oliver's Precedents, 464.

END OF MAY TERM, 1828.

[*178]

* CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1828, IN THE THIRTEENTH YEAR OF
THE STATE.

CUTLER *v.* COX.

RES ADJUDICATA—PLEADING.—If a plea of former recovery contain sufficient matter to show that the causes of action in the two suits are the same, and that the merits were determined in the first case, the plea is good; and it is not essential to the validity of the plea, that the forms of the two actions be the same (*a*).

SAME—CONTRACT—TORT.—A plea of former recovery to an action on the case founded on tort, can not be objected to merely because the first action was covenant; the causes of action appearing to be the same.

CONTRACT OF WARRANTY—BREACH OF—REMEDY—ACTION.—In the sale of goods with an express warranty as to their quality, assumpsit lies for the breach of contract not under seal. or case lies for the commission of the tort. So, if an injury be occasioned by the negligence of an attorney, or of a stage proprietor, assumpsit lies on the undertaking or case upon the duty. (*b*).

CONTRACT—FRAUD—BREACH.—If the breach of contract, for which an action of covenant is brought. was accompanied with fraud, the fraud is a proper subject of inquiry in that action, and may be specially averred in the declaration.

(*a*) See 49 Ind. 309; 12 *Id.* 629; 58 *Id.* 240; 45 *Id.* 489; 37 *Id.* 264.

(*b*) 9 *Id.* 572.

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FORMER RECOVERY—PLEADING—RECORD.—If a plea of former recovery aver the causes of action to be the same, and the record do not show them to be different, the averment, on a demurrer to the plea, must be taken as true.

CONTRACT—FRAUD—REMEDY—PRACTICE.—When an action on the case is brought for fraud in the breach of a contract, the gist of the action is the fraud committed at the time of the breach; and if the plaintiff can not maintain an action for the fraud committed at that time, no subsequent damages will enable him to maintain it.

RES ADJUDICATA—TORT—CONTRACT.—To an action of covenant for not furnishing such a boat as is required by a contract under seal, accord and satisfaction may be pleaded in bar; and if, on the trial of an [*179] issue to a replication denying the plea, there be a verdict and judgment for the defendant, the merits of the case are settled, and the judgment is a bar to any future action, though founded on tort, for the same cause.

PLEADING—ANSWER—PRACTICE.—If there be two pleas, each to the whole cause of action, and one on demurrer be adjudged good, the plaintiff can proceed no further.

ERROR to the Johnson Circuit Court.

BLACKFORD, J.—This was an action on the case founded on tort. The declaration contains four counts. The first three state that the parties entered into an agreement under seal, by which the defendant became bound to build for the plaintiff a good and sufficient New-Orleans boat, for a certain and fair price; that the boat was built and delivered, and the price paid; that at the time of delivery there were defects in the boat, which were under the water and not discoverable; that on taking the boat about two miles from the place of delivery, it sank in consequence of those defects. The first two counts aver that the defects were known to the defendant; and the third contains an express warranty. The fourth count states, that the plaintiff bargained with the defendant to buy of him a New-Orleans boat for a certain price; that the price was accordingly paid, and the boat delivered as a good and sufficient New Orleans boat; the averments in this fourth count as to the defects, the defendant's knowledge, and the loss of the boat, are similar to those in the

first two counts. All the counts allege special damage to a large amount, occasioned by the loss of the boat.

There are two special pleas in bar. The first is substantially as follows: that the plaintiff had previously impleaded the defendant in a plea of covenant, to recover damages for the non-performance of the agreements in the several counts of the present declaration mentioned; that the defendant pleaded an accord and satisfaction, on which issue was joined; that the parties produced their evidence on the trial of that issue; and that the verdict and judgment were in favor of the defendant, and were still in force. The plea also avers that the New-Orleans boat, mentioned in the action of covenant, is the same with that in this suit mentioned; and that the sealed agreement, set forth in the action of covenant, and the agreements, breaches, and offences, in the present declaration mentioned, are the same identical agreements [*180] and breaches, and not other *different agreements, offences, or breaches. There was a general demurrer to this plea, and judgment for the defendant.

As to form, this plea is very defective; but with that objection we have nothing to do on a general demurrer. If it contains sufficient matter to show that the causes of action in the two suits were the same, and that the merits were determined in the first case, the plea is a good bar.

The first inquiry then is, were the causes of action the same? All the counts in the present action, it is true, are founded in tort; but, at the same time, they all set out a contract, and show that this action is brought for a deceit in the performance of that contract. The first three counts explicitly state the contract to be under seal; the fourth is silent as to the seal, but the plea avers the agreement here stated to be the same sealed agreement mentioned in the other accounts, and the demurrer admits it to be so. The counts, also, all show that the contract was for the delivery of an Orleans boat, and that

the injury complained of, consisted in the boat's not being as good as the plaintiff had a right to expect. It is consequently plain, that these causes of complaint, here set out in this action on the case, are the legitimate foundation of an action of covenant; being the breaches of a contract under seal. Fraud to be sure is alleged in these breaches, but that circumstance tends to strengthen the idea of a violation of the contract. This fraud in the breaches shows, perhaps, that an action on the case for the deceit might have been supported; but it does not furnish the shadow of a reason against the propriety of an action of covenant, for the fraudulent breach of contract. That there should be two different forms of action for a redress of the injury here complained of, is nothing extraordinary. Similar occurrences are not unfrequent. For example, if in the sale of goods there be an express warranty as to their quality, assumpsit lies for the breach of contract not under seal, or case lies for the commission of the tort. So, if an injury be occasioned by the negligence of an attorney, by that of a coach proprietor, &c., you may bring assumpsit on the undertaking, or case upon the duty. Other instances might easily be given. The circumstance, then, that the former was an action of covenant is no evidence that the same injuries may not have been redressed by it, for which this action on the case is brought.

[*181] *The plaintiff contends, that, to the plea in a former suit, he could not reply the fraud set out in the present one. Whether he could or not, we shall not stop to inquire. The fraud in the breach of contract for which this action on the case is brought, was a proper subject of inquiry in the action of covenant. The plaintiff was bound, when he resorted to the action of covenant, to adopt the measures best calculated to secure an examination, in that suit, not only of the breach of contract, but of the fraud connected with it. His declaration was the appropriate place for any special averment of the

fraud, like that he speaks of, which might be deemed essential to a full investigation of the subject. If the fraud was not averred nor investigated in the first suit, the plaintiff should have shown it; and then it would have been proper to examine whether that could make any difference. No such thing, however, is shown; on the contrary, as the breach and offences in the second action complained of, are averred by the plea to be identically the same with those complained of in the first action; and as this fact is not only uncontradicted by the record, but admitted by the demurrer to the plea; we are bound to presume that all the fraud alleged in the present action on the case, was included in the former action of covenant.

The plaintiff further contends, that in the action of covenant the subsequent damages could not have been known; and that, therefore, for those at least this action will lie. This position is as untenable as the other. The gist of the action on the case is the fraud committed at the time of the breach of contract in the delivery of the boat. If the plaintiff can not maintain his action for that fraud, committed at that time, no subsequent damages will enable him to maintain it, because those damages can not of themselves constitute a cause of action. This principle is established by a very early case. A man brought an action of assault and battery for beating his head upon the ground, and recovered. Afterwards, a piece of his skull came out in consequence of the same battery, and he sued again. The former recovery, however, was held to be a bar to the subsequent suit. *Fetter v. Beale*, Salk. 11. That decision is referred to with approbation by Justice Holroyd, in the late case of *Howell v. Young*, 5 Barn. & Cress. 259. The subsequent damages, [*182] therefore, not constituting a ground of action,*furnish no reason for supposing the cause of the present suit to be different from that of the former one.

From the view which we have now taken of this case, the record does not appear to show any difference in these

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causes of action. To establish the difference, the plaintiff relies on the facts, that the first suit is covenant, and the second case; that the gist of the one is contract, and of the other fraud; and that damages, covered by the last suit, have accrued since the termination of the first. These circumstances have been examined, and we find them all to be perfectly consistent with the idea, that the causes of the two suits are substantially the same. The record, therefore, showing no difference in the causes of these actions, and the plea averring them to be the same, the plaintiff in making the objection, should have denied, by a special replication, that they were the same, and have thus submitted the question to the determination of a jury. Instead of doing so, however, he demurred to the plea, and thus trusted the fate of his objection to the face of the pleadings. That being the case, and the record not showing the causes of action to be different, they must be considered to be the same.

The second inquiry is, were the merits of the cause tried in the action of covenant? The plea was accord and satisfaction. The plaintiff contends that as his action was founded on a deed, this plea was no bar. He did not, however, trust to a demurrer; and, if he had so trusted, he would have failed. The objection is not tenable. The action of covenant was for a wrong in the furnishing of a boat, and the object was to recover damages for that wrong. But if the plaintiff had already received a satisfaction for the injury complained of, his right of action was gone; and the defendant could certainly plead the satisfaction in bar. This is the decision in *Blake's case*, 6 Coke, 44. The plaintiff, in answer to the plea, had a right to show that it was not true; or that the satisfaction was not a legal one. He chose to rest his case on the former ground, and accordingly replied to the plea by denying the accord and satisfaction. Issue was joined upon that replication; both parties produced their evidence at the trial; and a verdict and judgment were ren-

M'Coy and Another v. Elder.

dered for the defendant. This settled the merits of the action of covenant; a competent tribunal having determined that for the injuries there complained of, [*183] the *plaintiff had received a full compensation.

It settles also the present action on the case; because the substantial causes of the two actions being the same, as has been already shown, the decision which put an end to the one, must of course be a bar to the other. *Nemo bis vexari pro eadem causa*, is one of the first maxims of the law.

The plea therefore in this cause, of a former recovery, is a sufficient bar. There is another special plea, but it is unnecessary to examine it. One plea to the action, being adjudged good on demurrer, the plaintiff can proceed no further.

Per Curiam.—The judgment is affirmed with costs.

Hester, Sweetser and Gregg, for the plaintiff.

Whitcomb and Fletcher, for the defendant.

M'Coy and Another v. ELDER.

SHERIFF—FORM OF EXECUTION.—An execution commanding the sheriff that of the goods of A., B., and C., he make, &c., which D. had recovered against *the said A. and others*, is not objectionable for not stating the recovery to have been against the said defendants A., B., and C., the expressions being substantially the same.

EXECUTION—DEBTOR AND BAIL.—A joint execution may issue against a judgment-debtor and his replevin-surety.

DAMAGES—MEASURE OF—BREACH OF REPLEVIN-BOND.—Debt on a bond for the delivery of goods, taken on an execution which had issued against a judgment-debtor and his replevin-surety. Judgment, on demurrer, for the plaintiff. *Held*, that the measure of damages, if they did not exceed the penalty of the bond, was the amount due on the original judgment, with interest and costs; but that the assessment could not exceed the penalty (a).

(a) Post 268.

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APPEAL from the Decatur Circuit Court.—The bond on which this suit was brought, was executed by A. C. M'Coy and G. S. M'Coy, the defendants below, to A. Elder, the plaintiff below, conditioned for the delivery, at a particular time and place, of certain property to the sheriff, upon which he had levied an execution in favor of the plaintiff.

SCOTT, J.—Debt on a delivery bond. Demurrer to the declaration, and judgment for the plaintiff for the penalty of the bond, to be discharged by the payment of the damages sustained. Writ of inquiry waved and damages assessed by the Court, by consent of the parties. The record of the original judgment, on which the [*184] execution and replevin-bond were *founded, was produced in evidence, and final judgment rendered for the amount appearing to be due.

It is objected by the plaintiff in error that the execution is void, because it refers to a judgment against Angus C. M'Coy and others, not named, and the sheriff is commanded to levy it on the property of Angus C. M'Coy, John C. M'Coy, James Hamilton, Cyrus Hamilton, and John S. Forsyth. In the execution, as set out in the bill of exceptions, the command to the sheriff is in these words: You are hereby commanded that of the goods, chattels, lands and tenements, of Angus C. M'Coy, James Hamilton, Cyrus Hamilton, John C. M'Coy (and John S. Forsyth as security,) you cause to be made, to satisfy Andrew Elder, the sum of 212 dollars, which the said Andrew Elder, late in our Decatur Circuit Court, recovered against the said Angus C. M'Coy and others. There is no ambiguity in this phraseology; the execution-defendants are all named in the first instance, and the allegation that the amount to be made had been recovered against the said Angus C. M'Coy and others, is tantamount to saying it had been recovered against the said defendants, repeating all their names.

It is further objected that the execution is against five

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defendants, and the judgment on which it was issued is against four only. There is nothing in this objection. The judgment is against Angus C. M'Coy, James Hamilton, Cyrus Hamilton, and John C. M'Coy; and, after judgment rendered, John S. Forsyth became replevin-surety; the execution therefore very properly issued against the five.

The only remaining objection, which we deem it necessary to notice particularly, is, that the judgment, replevin-bond, and execution, were not proper evidence of the amount which the plaintiff was entitled to recover. Had the amount of the original judgment exceeded the penalty of the delivery-bond, and had judgment been rendered for that amount, there would have been some ground for this objection. The statute authorizing delivery-bonds, contemplates a bond in double the amount of the value of the property seized; that value is a matter to be settled between the sheriff and the execution-defendant at the time of giving the bond, and the penalty of the bond is a limit to the damages, which the defendant and his sureties agree to pay in case of failure to deliver the property.

[*185] *Below this amount, we know of no measure of damages, better adapted to the purposes of justice, than the original judgment with interests and costs (1).

Several other points have been noticed by the plaintiff in error, as defects in the proceedings, which, if they are defects at all, should have been taken advantage of at an earlier stage of the proceedings. The judgment of the Circuit Court must be affirmed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Stevens, for the appellants.

Lane and Smith for the appellee.

(1) The statute now is, that in cases like that in the text, the amount due on the execution shall be assessed in favor of the plaintiff, provided the property so taken be of sufficient value to satisfy the same, and if not,

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then the value of the property so taken, together with ten per centum thereon. R. C. 1831, p. 239.

It is decided, that, under this act, the plaintiff is entitled to the 10 per cent. damages, as well where the value of the property is sufficient to satisfy the execution, as where it is not. *Mitchell et al. v. Denbo*, May term, 1833. The law is the same in the case of delivery-bonds taken by constables. R. C. 1831, p. 107.

 MITCHELL v. SHELDON and Another.

CONSIDERATION—FAILURE OF—PLEADING.—If, to assumpsit on a promissory note, the defendant plead a failure of consideration on account of the non-delivery of goods, the plaintiff may reply generally, that the consideration has not failed. The note is *prima facie* evidence of a consideration; and the want or failure of consideration, in such case, must be pleaded and proved (a).

PRACTICE—TRIAL AND ISSUES.—Assumpsit on a promissory note. Two pleas: 1st, non-assumpsit, and issue; 2d, as to part, a failure of consideration. Replication as to the second plea, demurrer and judgment for the plaintiff. *Held*, that, whilst the first issue was undisposed of, the plaintiff could not have final judgment for the amount of the note (b).

ERROR to the Harrison Circuit Court.—Sheldon and Dixon were the plaintiffs below, and Mitchell was the defendant.

HOLMAN, J.—Assumpsit on a promissory note for 246 dollars and 48 cents. Pleas, first, non-assumpsit, and issue; secondly, that the note was given upon the consideration, that the plaintiffs agreed to put up and deliver to said defendant, goods, wares, and merchandise, to the value of said sum by invoice; and the said defendant avers, that the said plaintiffs failed to *deliver [*186] by invoice a part of said goods, wares, and merchandise, to the value of 100 dollars; which the said defendant is ready to verify. Wherefore he says, that the consideration of the note aforesaid, to the value of said goods, wares, and merchandise, not delivered as aforesaid, has failed. And as to the residue of said demand, in said declaration mentioned, the defendant says noth-

(a) 5 Blkf. 334; 6 *Id.* 222.

(b) 36 Ind. 241; 48 *Id.* 107; 50 *Id.* 529; 54 *Id.* 161; 55 *Id.* 194; 60 *Id.* 95.

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ing in bar or preclusion thereof; nor can he deny that for said residue he did undertake and promise, as charged in said declaration. Replication, that the plaintiffs ought not to be barred from maintaining said action for the full amount mentioned in said note, because they say, that the consideration of the said note hath not failed, nor has any part thereof, in manner and form as the defendant hath stated, &c. Special demurrer by the defendant, because the replication does not specially answer the allegations in the plea, nor aver the delivery of the goods, &c.

The Circuit Court overruled the demurrer, and gave judgment for the plaintiff for the amount of the note, without taking any notice of the issue on the plea of non-assumpsit. This was wrong; and this is the only error in the case; for the replication to the special plea is sufficient. The note is *prima facie* evidence of a consideration, and when a want or failure of consideration is relied on, it must be pleaded and proved. The non-delivery of the goods, mentioned in the special plea, constituted the failure of consideration set up in this case, and it lay upon the defendant to prove that the goods were not delivered. Consequently, a general replication was all that could be required of the plaintiffs. But final judgment should not have been given, until some disposition had been made of the first issue. It is true, that all the amount of the note but 100 dollars, is admitted to be due to the plaintiffs, yet as the plea of non-assumpsit extends to the whole cause of action, the claim of the plaintiffs to the 100 dollars may be controverted under it: the issue on that plea should, therefore, have been submitted to a jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Nelson and Farnham, for the plaintiff.

Dewey, for the defendants.

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[*187] *WRIGHT v. MATHEWS and Another.

WITNESS—INTERESTED—VOIRE DIRE—BY WHOM EXAMINED.—If a witness be objected to as interested, and his interest be proved by other witnesses, the party calling the witness has no right to examine him on his *voire dire*; that right belonging alone to the party who makes the objection.

REPLEVIN—RIGHT TO A PART—PRO TANTO.—If an action of replevin be brought for taking several articles, and, on an issue as to the plaintiff's property in them, he only prove himself entitled to a part,—the defendant has a right to a return of the others and to damages for the taking of them. In such case each party succeeds, and each is entitled to his costs.

RENT—DISTRESS—AVOWRY—PLEADING.—An avowry for rent due need not show that a warrant, founded on oath, had been taken out before making the distress; nor that the goods distrained belonged to the tenant; nor need it set out the particulars of the landlord's title (a).

ERROR to the Wayne Circuit Court.

BLACKFORD, J.—William and Jonathan Mathews brought an action of replevin against William Wright. The declaration states, that, in a certain house in the town of Milton, county of Wayne, the defendant forcibly took and unlawfully detained from the plaintiffs 17 planes, 3 hand-saws, 2 tenon-saws, 8 paring chisels, 6 mortising chisels, 1 bureau, and a variety of other articles particularly described in the declaration, alleged by the plaintiffs to be their joint property.

The defendant avowed the taking as a distress for rent. The avowry is as follows: And the said William Wright comes and defends the wrong and injury, when, &c., and well avows the taking of the said goods and chattels in the said declaration mentioned, in the said house in which, &c., and justly, &c., because he says that one Nathaniel Peak for a long time, to wit, for the space of one year next before and ending on the first day of June, 1827, and from thence until and at the said time when, &c., held and enjoyed the said house in which, &c., with the appurtenances, as tenant thereof to the said William

(a) 1 Ind. 54; 6 Id. 414; 2 Id. 579.

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Wright, by virtue of a certain demise thereof to him the said Nathaniel Peak theretofore made, at and under a certain yearly rent, to wit, the yearly rent of 18 dollars, payable at the expiration of the year; and because the said sum of 18 dollars, the rent aforesaid for the space of one year, ending as aforesaid on the said first day of June, 1827, and from thence until and at the said time when,

&c., was due and in arrear from the said Nathaniel Peak to the said William Wright; he the said *defendant well avows the taking of the said goods and chattels in the said house, in which, &c., as for and in the name of a distress for the said rent so due and in arrear to the said William Wright as aforesaid, and which still remains due and unpaid. And this he is ready to verify; wherefore he prays judgment and a return of the said goods and chattels to be adjudged to him, &c. The defendant also pleaded, 1st, property in himself; 2d, property in Nathaniel Peak. The plaintiffs demurred generally to the avowry; and replied to the pleas, property in themselves.

On the demurrer to the avowry, the Court rendered judgment in favor of the plaintiffs. At the trial of the issues joined on the pleas, a witness of the defendant was objected to as being interested. The plaintiffs proved the incompetency, by other witnesses, to the satisfaction of the Court. After which, the defendant offered to swear the witness on his *voir dire*, for the purpose of showing that he was not interested. The plaintiffs objected to this, and the Court sustained the objection. When the testimony was closed, the Court instructed the jury, that if the plaintiffs had supported their case as to any one article of property specified in the declaration, although they had failed as to all the residue, they were entitled to a verdict for so much. The verdict was as follows: "We the jury have agreed, and find for the plaintiffs, and assess their damages at 5 dollars." Judg-

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ment was accordingly rendered for the damages so found, together with the costs of suit.

Wright is the plaintiff in error, and assigns the following reasons for a reversal of the judgment against him: 1st, that the witness should have been sworn on his *voir dire*; 2d, that the instructions to the jury were incorrect; 3d, that the demurrer to the avowry should not have been sustained.

There is nothing in the first objection. A witness can never be examined on the *voir dire* as to his interest, unless called on by the party objecting to him. This point is expressly decided in *Vincent v. Lessee of Huff*, 4 Serg. & R. 298.

As to the second objection, the instructions of the Court ought not, certainly, to have stopped where they did. The defendant in replevin is an actor. He is entitled to a return of all the goods which the plaintiff does not prove himself authorized to retain. When [*189] the Court, therefore, informed the *jury that the plaintiffs were entitled to a verdict as to the part proved, though they had supported their case only as to a single one of the articles mentioned in the declaration, they ought to have gone further and informed the jury, also, that, as to the residue of the articles, it was their duty to find for the defendant. The issues in fact were upon the plaintiffs' property in the goods. Their proof of property in a part, entitled them to damages on account of the unlawful taking of that part. Their failure of proof as to the residue, entitled the defendant to a return thereof, and also to damages on account of this part of the goods having been improperly taken on the writ. In such a case each party succeeds, and, under the statute giving costs to the successful party, each is entitled to his costs. *Powell v. Hinsdale*, 5 Mass. 343. The instructions of the Court must be presumed to have been applicable to the case; and it is easy to conceive, that they may have misled the jury by inducing them to confine their verdict

to the benefit of the plaintiffs, instead of extending it also to the benefit of the defendant.

The third error assigned is, that the demurrer to the avowry was improperly sustained. The first objection made by the defendants in error to the avowry, is, that it does not show that a warrant, founded upon oath, was taken out by the landlord before making the distress. It is true, that the statute of 1824 requires an oath and warrant previously to the distress; but we do not think that this circumstance need change the established form of the avowry. Before the statute of frauds, the verbal promise of an executor was obligatory; this law was altered by that statute, and it became necessary for the promise to be in writing. The form of the declaration, however, continued as it was previously to the statute. So, in the present case, these statutable requisitions to the validity of a distress, like that of writing to the validity of an executor's promise, may be considered as matters of evidence, and not of pleading. Another objection of the defendants in error to the avowry is, that it does not negative their averment of property in the goods. There is nothing in this objection. The goods were found on the premises of the tenant, and were consequently subject, *prima facie*, to be distrained by the landlord for rent arrear, without regard to whom they [*190] belonged. Bradby on *Distress, 106. If these goods were within any of the rules of exemption prescribed by the law, the plaintiffs below were bound to show that circumstance by a plea to the avowry. That was the course pursued in *Francis v. Wyatt*, 3 Burr. 1498. Had the avowant averred, as it is contended he should have done, that the goods distrained were the property of the tenant, the avowry would have been without a precedent in the history of the action of replevin.

The plaintiff in error, however, is mistaken when he supposes this avowry to be good at common law. It can not be supported under that law, because the title of the

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landlord to the premises, on which the distress was made, is not set out in the avowry. 2 Will. Saund. 284. It would not be good in New York in consequence of that defect. *Harrison v. McIntosh*, 1 Johns. R. 380, 384. But in England, now, by the statute of 11 Geo. 2, the landlord is excused from setting forth his title further than is done in this avowry. 2 Will. Saund. 284. We have a statute similar to that of Geo. 2, which authorizes the same mode of proceeding, R. C. 1824, p. 163; and it is this statute of ours, and not the common law, which authorizes the avowant to omit the particulars of his title.

It has now been shown that the avowry, in this case, can not be objected to for not averring the previous issuing of a warrant, founded on the landlord's oath, because that is a matter of evidence, not of pleading; nor for not averring the goods to be the tenant's property, because no law requires such an averment; nor is it defective on account of the landlord's title to the premises not being specially stated, because the statute has dispensed with that formality. The consequence is, the demurrer to the avowry should have been overruled.

It will be recollected that it appears by this record, that there were two issues in fact and one in law, all of which were determined in favor of the plaintiffs below. The verdict can not be sustained, because the instructions to the jury were incorrect; and the judgment on demurrer is erroneous, because the avowry is good.

Per Curiam.—The judgment is reversed, and the proceedings on the issues are set aside, with costs. Cause remanded, &c.

Smith, for the plaintiff.

Rariden, for the defendants.

Ungles v. Graves.

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*UNGLES v. GRAVES.

EVIDENCE—EXECUTION OF DEED.—The subscribing witness to a deed resided in Ohio, and the acknowledgment had been taken there before the mayor of Cincinnati. *Held*, that the deed,—on proof that the grantor had executed it, and that the witnesses had subscribed it, in the presence of the witness,—was admissible in evidence (a).

RENT—CONSTABLE—LEVY.—A constable is virtually within the provisions of the statute, requiring sheriffs to pay rent before the removal of goods taken in execution on demised premises; and, when sued for improperly paying rent, he is bound to give some evidence that the rent was due.

ERROR to the Marion Circuit Court.

HOLMAN, J.—Graves obtained a judgment before a justice of the peace against Rufus Jennison. On this judgment he took out an execution, which he placed in the hands of Ungles, a constable. Ungles returned, that, out of the property of said Jennison, he had made the sum of 57 dollars and 31 cents; all of which, except the costs, he had paid to Samuel Jennison, on notice: which notice, being a claim of said Samuel Jennison's to the sum of 75 dollars, for two quarters' rent of the premises on which the property was executed, was made a part of the constable's return. Graves then sued out a *scire facias*, requiring Ungles to show cause why he should not pay, on said execution, the money thus paid to Samuel Jennison. To this *scire facias*, the notice and claim of Samuel Jennison were pleaded; with an averment that the said Samuel Jennison, the landlord of the premises on which the property was executed, proved to the satisfaction of the constable, that he, as landlord, was entitled to said money, for rent then due, which money was paid accordingly. The justice of the peace gave judgment in favor of Ungles. Graves appealed to the Circuit Court, and obtained a judgment against Ungles for the amount he paid to the landlord.

By a bill of exceptions we learn, that, on the trial be-

(a) 7 Blkf. 176, 355; 4 *Id.* 522.

fore the Circuit Court, Ungles introduced a patent from the United States to David E. Wade, for the premises on which the property was executed; and offered in evidence a deed from Wade to Samuel Jennison for the said premises, attested by Isaac G. Burnett and William

Jones, and acknowledged before Isaac G. Burnett, [*192] *mayor of Cincinnati; which deed was rejected by the Circuit Court. He then proved by Rufus Jennison, that Wade signed, sealed, and acknowledged said deed; and that Isaac G. Burnett and William Jones, who now reside in the city of Cincinnati, state of Ohio, subscribed their names as witnesses to said deed in his presence. This evidence was also rejected by the Circuit Court; but we think it should have been admitted.

A constable, though not named, is, virtually, within the provisions of the act of assembly, that requires sheriffs to pay rent due on demised premises, before property taken in execution on said premises is removed; and, when sued for paying rent improperly, he is bound to give some evidence that the rent was due. 3 Stark. Ev. 1354; *Keightley v. Birch*, 3 Campb. 521. The landlord's title to the premises is a principal feature in the officer's defence; and we think the deed from Wade to Samuel Jennison, was sufficiently proved by the testimony of Rufus Jennison. When the subscribing-witnesses to a deed reside in another state, proof of their hand writing is generally deemed sufficient. In some cases, however, proof of the hand writing of the obligor or grantor has also been required. In this case, the evidence embraces both these requisitions. Rufus Jennison, who is a competent witness, testifies to the execution of the deed by Wade, and to the attestation of it by the subscribing-witnesses in his presence; which fully answers all that is required in any case we have yet seen. See a variety of cases on this subject cited in 1 Stark. Ev. 338-342.

The State, on the relation of Merrill, &c., v. M'Clane and Others.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Brown, for the plaintiff.

Fletcher, for the defendant.

THE STATE, on the relation of MERRILL, &c. v. M'CLANE and Others.

SHERIFF'S BOND—ACTION ON—RELATOR.—An action on a sheriff's bond, for not collecting militia fines due to the county seminaries, lies in the name of the state on the relation of the treasurer, who is the trustee of the fund.

SAME—PLEADING—PAYMENT OF PENALTY.—It is unnecessary, in the declaration on a sheriff's bond, to aver a non-payment of the [*193] *penalty. *Aliter*, in the case of penal bonds payable by one private person to another.

APPEAL from the Wayne Circuit Court.

SCOTT, J.—An action was instituted in the Wayne Circuit Court by the state of Indiana, on the relation of Samuel Merrill, treasurer, for the use of the county seminaries, against William M'Clane, sheriff of Wayne county, and his sureties, on his official bond. The declaration charges that certain lists of fines for non-performance of military duty had been put into the hands of the defendant M'Clane, as sheriff, for collection; and that he had neglected and refused to collect the same. The defendants demurred generally to the declaration, and had judgment in the Circuit Court.

It is alleged in support of the demurrer, that no person appeared as a relator who was responsible for costs. This objection to the declaration we think insufficient. The fines mentioned in the declaration belong, when collected, to the seminary fund: Samuel Merrill, as treasurer, is the trustee of that fund; he is, therefore, the proper person to appear as relator in such cases. It is a general rule that the unsuccessful party pays costs, but there are some

The State on the relation of Merrill, &c., v. M'Clane and Others.

exceptions to that rule. It is a general rule, also, that, in actions brought on official bonds, some person must appear as relator who has a beneficial interest in the suit, and who is responsible for the costs, where costs are legally demandable; but it does not follow that no man can appear as relator in cases where the law allows no costs.

Another, and we presume the principal ground taken in support of the demurrer, is, that the declaration contains no averment of the non-payment of the penalty of the bond by the defendants or either of them. This ground is also untenable. In actions on common penal bonds for the payment of money, or for the performance of some specific duty to any private person, it is necessary, in the declaration, to aver the non-payment of the penalty as well as the breach of the condition; and such are all the forms; but a sheriff's official bond is made for a different purpose and is subject to a different rule. Official bonds are made to the state for the benefit of all persons, who may be aggrieved by the negligence or malconduct of the officer. No man in the state is com-
[*194] petent to receive the amount *of such bond; no payment to any man in the state would exonerate the officer or his sureties; and it is therefore unnecessary to aver, in the declaration, the non-payment of the penalty.

For these reasons we think the demurrer ought to have been overruled.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

Rariden, for the appellant.

Dunn, for the appellees.

 Whalen v. Layman.

WHALEN v. LAYMAN.

MARRIAGE CONTRACT—BREACH—SEDUCTION.—In an action for a breach of promise of marriage, the plaintiff may introduce evidence of seduction (a).

ERROR to the Bartholomew Circuit Court.—Sarah Layman brought an action of assumpsit against Thomas Whalen for a breach of promise of marriage. The defendant pleaded the general issue. Verdict and judgment for the plaintiff.

SCOTT, J.—In an action for a breach of promise of marriage, the plaintiff offered proof of seduction. The defendant objected; but the Court overruled the objection, and permitted the evidence to go to the jury; and there was a verdict for the plaintiff below for 100 dollars. The admission of evidence of seduction is complained of by the plaintiff in error, and this is the only point in the case. There is no error here. The evidence was proper for the consideration of the jury, and the Court acted correctly in admitting it. 2 Stark. Ev. 942, n. 1; *Paul v. Frazier*, 3 Mass. R. 73; *Boynton v. Kellogg*, id. 189. The contrary was decided in the case of *Burks v. Shain*, 2 Bibb, 341; but that case is not supported by any other decision within our knowledge.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Sweetser, for the plaintiff.

Wick and Herod, for the defendant.

[*195] *DOE, on the Demise of SHEETS, v. ROE, on Appeal.

LIEN OF JUDGMENT—WHEN EXTINGUISHED.

THE lien of a judgment is not extinguished by the execution of a replevin-bond, but continues until the judgment is actually satisfied (1).

(a) 2 Ind. 402; overruled, 48. *Id.* 562.

Crane and Wife v. Douglass.

(1) The statute now expressly enacts,—that “the entering of security by recognizance of record for the payment of any judgment, and the replevying of an execution in the hands of an officer, and the giving of a bond for the delivery of property on execution, shall neither nor all operate as a satisfaction of the original judgment, upon which such proceedings shall or may be had, so as to extinguish the lien created by such original judgment, upon the estate of any judgment-debtor.” R. C. 1831, p. 243.

CRANE and Wife v. DOUGLASS.

SLANDER—JUSTIFICATION—MALICE.—Case by A. against B. for slanderous words. Plea, that the defendant had heard from C. the charges mentioned in the declaration, and that, at the time the defendant spoke the words, he stated that C. had told him so. Replication, that the defendant had spoken and published the words falsely and maliciously with a knowledge that they were false, and with the intent alleged in the declaration. *Held*, on special demurrer, that the replication was good (a).

APPEAL from the Jackson Circuit Court.

SCOTT, J.—To an action on the case for slanderous words, the defendant, after the general issue, pleaded specially, that he had heard from one John Mapes the said several charges in the declaration mentioned, and that, at the several times of speaking the words, he had stated, in the presence of the same persons in whose hearing the words were spoken, that John Mapes told him so. To this plea the plaintiffs replied, that the defendant spoke and published the words falsely and maliciously, of his own wrongful and malicious disposition, and with a knowledge of their being false, and with the purpose and intent as in said declaration is suggested; and not in the manner and with the intent and purpose as, in said plea, by him is pleaded and suggested. There was a special demurrer to this replication, and judgment for the defendant. We think this was wrong. When a plea [*196] consists merely of matter of excuse or *justification, the general replication, *de injuria sua propria*, is the proper answer, and puts the whole plea in issue.

(a) 5 Blkf. 574; 9 Ind. 506.

 Crane and Wife v. Douglass.

Stark. on Sl. 348, 1 Saund. 244, a. n. 7 (1) The fact that the defendant heard the slander from another person, and that he gave the name of the author at the time of repeating it, does not, *per se*, amount to an absolute justification; it only raises a presumption, *prima facie*, in his favor, that he did not circulate the slander maliciously; which presumption may, notwithstanding, be rebutted by testimony going to prove positive malice. Stark. on Sl. 213, 397. The replication answers the plea according to its legal effect and operation, and takes away all the matter of exculpation contained in it; and the defendant, by the demurrer, admits that he uttered the slander maliciously (2).

Per Curiam.—The judgment is reversed with costs. Cause remanded, with directions to permit the defendant to withdraw his demurrer, &c.

Nelson and Farnham, for the appellants.

Hawk, for the appellee.

(1) The replication, *de injuria*, is spoken of as follows in a late valuable treatise on pleading: "This species of traverse occurs in the *replication*, in actions of *trespass* and *trespass on the case*; but is not used in any other stage of the pleading. In these actions, it is, in general, the *proper* form, wherever the replication traverses the plea in bar. But to this, there are the following large exceptions: When the matter to be traversed consists either of matter of *title or interest*,—or *authority of law*,—or *authority in fact* derived from the opposite party,—or matter of *record*,—in any of these cases, the replication *de injuria* is generally improper; and the traverse should be in the common form; that is, in the words of the allegation traversed." Steph. on Plead. 187, 188. Crogate's case, 8 Co. 132, is cited for the above doctrine, and is the leading case on the subject. The following is a decision of the Court of King's Bench, in 1832: "An avowry in replevin stated that the plaintiff was an inhabitant of a parish, and ratable to the relief of the poor, in respect of his occupation of a tenement situate in the place in which, &c.; that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was in respect of such occupation duly rated in the sum of 7*l.*; that he had notice of the rate, and was required to pay, but refused; that he was duly summoned to a petty sessions to show cause why he refused; that he appeared and showed no cause, whereupon a warrant was duly made under the hands of two justices of the peace, directed to defendant, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to defendant, under which he as collector justified taking the goods as a distress, and prayed judgment and a return. Plea in bar, *de injuria*, &c. Special demurrer, assigning for cause, that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not in justification and claim of right.

Crane and Wife v. Douglass.

Held, by Parke and Patteson, Js., Lord TENTERDEN C. J. dissentiente, that the the plea in bar was good." *Selby v. Bardons*, 3 Barn. & Adol. 2. [*197] *It appears by the last-cited case, 1st, that as the interest claimed by the avowry did not exist previously to the seizure complained of, that interest did not excuse the plea of *de injuria*; 2d, that the facts stated in the avowry fall within the principle of a justification under any Court not of record, where *de injuria* generally is good; 3d, that as all the facts in the avowry show but one cause of defence, the multiplicity of the matters put in issue was no objection to the plea of *de injuria*. The judgment in this case was, in 1833, affirmed in the Exchequer Chamber. *Bardons v. Selby*, 9 Bing. 756.

(2) Northampton's case, 4th Resolution, 12 Co. 134, is the leading case on this subject. That case, so far as it imports a general position,—that the repetition of slander is always justifiable, if the party state at the time of repeating the words the name of the author,—may be considered as overruled in the English Courts. The following is a decision of the Court of King's Bench in 1829: "In an action for slander, for words spoken of the plaintiff in his trade, importing a direct assertion made by the defendant, that the plaintiff was insolvent, the defendant pleaded that one T. W. spoke and published to the defendant the same words, and that the defendant, at the time of speaking and publishing them, declared that he had heard and been told the same from and by the said T. W. *Held*, upon demurrer, that this plea was bad,—1st, because it did not confess and avoid the charge mentioned in the declaration, the words in the declaration importing an unqualified assertion made by the defendant in the words stated in the declaration, and the words used in the plea, importing that the defendant mentioned the fact on the authority of T. W.;—2d, because it did not give the plaintiff any cause of action against T. W., inasmuch as it did not allege that T. W. spoke the words falsely and maliciously;—3d, because it is not an answer to an action for oral slander for a defendant to show that he heard it from another, and named the person at the time, without showing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion." *M'Pherson v. Daniels*, 10 Barn. & Cress. 263.

The Court of Common Pleas in 1830, in speaking of the 4th Resolution in Northampton's case, says, "But the resolution above referred to, which has at all times been looked at with disapprobation, has, in the recent case of *M'Pherson v. Daniels*, 10 B. & C. 263, been in effect overruled by the Court of K. B.; and with the judgment of that Court, upon that occasion, we entirely concur. *Ward v. Weeks*, 7 Bing. 211.

END OF NOVEMBER TERM, 1828.

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* CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1829, IN THE THIRTEENTH YEAR OF THE
STATE.

ELLIOTT v. ARMSTRONG.

TRUST—EXPRESS—IMPLICATION.—A *trust estate* in real property, as separate from the *legal ownership*, may either be created by an express declaration of the trust; or it may be raised upon certain facts by implication of law (a).

SAME—EVIDENCE.—The statute of frauds requires all declarations of trust in land *to be proved* by written testimony; but those trusts which arise by the mere operation of law, are excepted out of the statute and may be provided by parol evidence (b).

SAME—IMPLICATION.—If A. purchases land *with his own money*, and the deed be made to B., a trust results in favor of A., provided there be no circumstances in the case to rebut this presumption of the law.

SAME—REMEDY—PLEADING—PARTIES.—To a bill in chancery by the grantee of a *cestui que trust* against the trustee to obtain the legal title, the grantor need not be a party either as complainant or defendant.

CONTRACT—CONSIDERATION—FAILURE.—A. contracted to sell to B. certain real estate, in consideration that B. should give up a note held by him against A., and pay to A. a small sum of money. The giving up of the note to A. was the principal part of the consideration. B. subsequently

(a) 3 Blkf. 39. (b) 4 *Id.* 539; 3 *Ind.* 558; 7 *Id.* 277; 9 *Id.* 347.

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pledged the note to a third person, and absented himself from the country for 7 years, without paying any part of the purchase-money. *Held*, that A. was discharged from the contract.

TRUST—CONVEYANCE BY CESTUI QUE TRUST.—The estate of a *cestui que trust* may be sold and conveyed by him, as well as any other estate.

DEED—WARRANTY—CONSIDERATION.—A release by the grantee, of the covenant of a warranty contained in a conveyance of real estate, does not affect the validity of the conveyance.

TRUSTEE—SALE OF TRUST.—The estate of a bare trustee is not subject to be sold on an execution against him.

JUDICIAL SALE—VOID EXECUTION.—The sale of real estate on void execution is a nullity, and vests no title in the purchaser.

[*199] *TRUST—EVIDENCE—STATEMENTS IN DEED.—A complaint in chancery may prove, by parol evidence, in order to show a resulting trust, that the purchase-money for real estate conveyed to another was paid by himself, though the deed state that the money was paid by the grantee, and the answer contain a denial of the trust.

PLEDGE—OWNERSHIP—REDEMPTION.—The absolute right of property and the right of possession in a note which had been pledged for the payment of a debt, become, on payment of the debt, vested in the pledgor; and if the note be afterwards converted by the pledgee to his own use, he is liable to the pledgor in an action of trover.

SALE—MARKET OVERT.—In the sale of personal property, not in market overt, the general rule is, that, though the purchase be *bona fide* for value, the purchaser receives no better title than that of which the seller was possessed. But bills of exchange and promissory notes are exceptions to this rule; when they are originally payable to bearer; or when, in the first instance, they are payable to order and afterwards by a blank endorsement become payable to bearer; they pass by delivery; and the purchaser who uses due caution, pays a valuable consideration, and takes them in the common course of business, has a good title against all the world, whether the seller had any title or not. A note payable to order, however, can not pass without an endorsement either by the payee or by some person in the payee's name and by his authority (c).

TRUST—BY IMPLICATION—PRESUMPTION.—The trust, in real estate conveyed to A. resulting in favor of B. in consequence of his payment of the purchase-money, is a kind of arbitrary implication raised, to stand until some reasonable proof be brought to the contrary; and if the money was paid for the express purpose of vesting in A. both the beneficial and legal interest, no trust can result in favor of B.

SAME—RIGHT OF CREDITORS.—A. made a verbal contract for the purchase of a town lot, and, during A.'s absence from the country, B. partly with his own money but principally with A.'s property, completed the contract for A., and took the deed in the name and for the benefit of A. *Held*,

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that A.'s subsequent ratification of B.'s acts made him liable to B. for the amount paid for him by B.; and also rendered the lot as A.'s property liable, from the date of the deed, to a judgment against him in favor of B.

APPEAL from the Dearborn Circuit Court.

BLACKFORD, J.—This is a suit in chancery from the Dearborn Circuit Court. Armstrong was the complainant below, and Elliott the defendant. It is the case of a *cestui que trust*, demanding a conveyance of real estate from his trustee.

The bill states, that Vance and Dill, being indebted to Elliott in the sum of 67 dollars and 56 cents for cooper's work, gave him their due-bill, dated the 15th of March, 1805; and thereby acknowledged themselves indebted in that amount to Elliott or order; that shortly afterwards, Vance, for the purpose of paying the said note, proposed to let Elliott have a town lot, numbered 171, in Lawrenceburgh, for 75 dollars; Elliott paying the difference between the amount of the note and the price of the lot; to which proposition Elliott seemed willing; and he was to receive a bond for a deed, as soon as he gave up the note and paid the said balance; that in 1807 [*200] Elliott left *the Western country, having first transferred the note of Vance and Dill, by delivery, to Ruffin of Cincinnati, as collateral security for a debt which Ruffin, as Elliott's surety, was bound for to Vattier, and had afterwards to pay: and that Ruffin, having been told by Elliott that Vance and Dill would pay the note on sight, called upon Vance to his astonishment for payment; that when Elliott transferred the note he made no arrangement, nor has he made any since, for paying the consideration-money for the lot; nor did he signify then, nor has he signified since, any intention or wish to have the lot in the manner proposed by Vance, or otherwise.

The bill further states that, in 1810, Horner, having claims against Elliott, sued out an attachment against him,

which was levied on the said lot, numbered 171, under the impression that it was Elliott's; and that, in 1811, judgment was obtained on the attachment for upwards of 100 dollars: which judgment is assigned to the complainant; that on Horner's discovering that Vance had still the legal and equitable title to the lot, Vance agreed to let Horner have it at the same price that Elliott was to pay; that is, upon his getting up for Vance the said note, which was then Ruffin's, and paying Vance the balance of the consideration-money; and that with these terms Horner complied; that some doubts existed with Vance as to whom the deed ought to be made; whether directly to Horner, he having paid the whole consideration-money; or to Elliott, so that Horner might sell the lot by virtue of his judgment on the attachment; that Vance, however, being advised so to do, made the deed to Elliott, but delivered it to Horner for his sole benefit; Horner having paid the whole of the purchase-money; that Horner then took out execution on his judgment against Elliott, levied it upon the said lot, bought the same for 75 dollars at the sheriff's sale, and received the sheriff's deed; the said amount passing as a credit to Elliott upon the judgment; that in 1812, Horner, by virtue of the premises, took possession of the said lot, and continued to occupy it and pay the taxes until 1816; when the complainant, believing the lot to be Horner's in fee simple, purchased the same for 300 dollars, received a deed from him, took peaceable possession, and proceeded to make valuable improvements.

The bill further states that Elliott returned to [*201] the country in *1819; and, being informed of the deed, and of the sale of the lot on execution, he said that the deed to him had been made without authority, and refused to take it out of the recorder's office; but hearing soon after, that the sheriff's sale was probably erroneous, if not void, he took the deed, and in an action of ejectment for the lot, commenced in 1819, recovered

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judgment against the complainant in 1821, on the ground that the sheriff's sale to Horner was void; which judgment was affirmed by this Court in 1822; that until after the said judgment in ejectment, the complainant was ignorant of all the facts in relation to this his equitable defence, growing out of the trust and payment of the consideration-money; and that Elliott threatens that he will take possession of the lot, and the improvements.

The prayer of the bill is, that the defendant be compelled to convey the said lot to the complainant, and be enjoined from proceeding at law, &c.

To this bill the defendant answers as follows:

That Vance and Dill, being indebted to the defendant for cooper's work, gave him their note about the time expressed in the bill, for about 70 dollars; that soon after, he contracted with Vance to take the lot, numbered 171, in satisfaction of the note, but took no bond or deed from Vance for the lot, as the title was yet in the government; that he does not recollect that the price of the lot exceeded the amount of the note, but that if it did, he paid the difference in cooper's work; that immediately after the purchase, the defendant took possession of the said lot, occupied one of the two log buildings on it as a cooper's shop, and carried on the business of a cooper on the lot from the time of the purchase in 1805, until February or March, 1806, when he went to the Eastern states; leaving a journeyman of his at work on the lot, and Percival his general agent.

The answer also states, that when the defendant, in 1806, was about leaving the country, thinking some accident might happen to him before his return, and Ruffin being his surety to Vattier for about 66 dollars, not due for several months, he left the said note with Ruffin as a collateral security, in case he should have to pay Vattier; the defendant supposing the lot might be had of Vance upon production of the note; but he denies that he ever

[*202] sold the note to Ruffin, or told him that *Vance

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would pay it upon sight; that after Ruffin had paid Vattier, and long before he had given up the note of Vance and Dill, Percival, the defendant's agent, placed in Ruffin's hands a note belonging to the defendant, against Brown for about 80 dollars, to be collected; with instructions to Ruffin to pay himself out of the proceeds; and that judgment was obtained on this note against Brown, and the money, to wit, 87 dollars and 50 cents, paid to Ruffin, leaving a balance of about 20 dollars due to the defendant.

The defendant admits, that there was something due from him to Horner at the time of the attachment, and that judgment was thereon obtained as stated in the bill. He states that he has been informed and believes that Horner, so far from contracting with Vance for the said lot, procured a deed to be made for it to the defendant, not through mistake, but for the express purpose of selling it upon his said execution, as a mere equity could not be sold. He denies that he was ever the trustee of Horner, so far as he can understand his rights. He admits that the said lot was sold on execution, upon the said judgment, at the time stated in the bill; and that Horner, the judgment-creditor, became the purchaser and received the sheriff's deed.

The defendant admits that, on his return in 1819, he accepted the deed which had been made to him by Vance, and took it from the recorder. He admits having said, that Horner had no right to have a deed executed, until the defendant chose to take it from Vance. He also admits that, immediately on his return, he took the necessary steps to regain possession of the lot, brought an ejectment in the same year, and afterwards obtained a judgment against the complainant as stated in his bill. He denies all fraud, &c.

In addition to the answer, the defendant pleaded in bar, a release made by the complainant to Horner, of the

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covenant of warranty, contained in Horner's conveyance of the premises to the complainant.

There is a general replication to the answer. To the plea no reply was required.

The material facts, presented by the exhibits and proofs contained in the record of this cause, are believed to be the following:

[*203] *Vance and Dill, inhabitants of Lawrenceburgh, being indebted to Elliott, the defendant, who resided in the same place, for cooper's work, gave him their note, dated the 15th of March, 1805, for 67 dollars and 56 cents, that being the amount they owed him. This note reads as follows: "Due Samuel Elliott or order, 67 dollars and 56 cents, for value received. March 15th, 1805."

At some time during the same year, 1805, a conversation took place in Lawrenceburgh between Vance and Elliott, respecting the sale by the former to the latter of a lot in that town, numbered 171; the same which is now the subject of dispute. In that conversation, Vance proposed to sell the lot to Elliott, and Elliott agreed to take it of him, at the price of 75 dollars. This was only a verbal contract, and was not to be considered complete, until Elliott should give up the note of Vance and Dill of 67 dollars and 56 cents, and pay to Vance the difference between the amount of the note and the price of the lot. Immediately after this contract, and in consequence of it, Elliott took possession of the lot, and occupied a cabin on it as a cooper's shop, until some time in the year 1806, when he left Lawrenceburgh and went to New Hampshire; leaving some property on the lot, and a journeyman at work in the shop.

Previously to his going away, Elliott had become indebted to Vattier, of Cincinnati, in about 66 dollars, and had given to him a note for the amount payable at a future period, with Ruffin, of Cincinnati, as his surety. When Ruffin heard that Elliott was about to leave the country, he requested from him security against his lia-

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bility to Vattier. Elliott, accordingly, placed in Ruffin's hands the note of Vance and Dill, as a collateral security and indemnity against the claims of Vattier; but he did not endorse it. This note Ruffin was to collect from Vance and Dill, in case he should be obliged to pay the debt due to Vattier, which would be due in a few months.

Elliott, when he went away, left some business unsettled. He owed some money, and there were some debts due to him. He appointed Percival, of Lawrenceburgh, his general agent; and left with him, among other claims, a note against Brown, of Hamilton county, Ohio, for 87 dollars and 50 cents, payable in hogshead staves to be delivered at Lawrenceburgh, one-half in June, and the other half in September, 1806. In the opinion [*204] of his agent, Elliott left sufficient property to pay his debts, if his business had been properly managed. The principal demand against him, beside that of Vattier, was one in favor of Horner, of Lawrenceburgh, for about 100 dollars.

Some time after Elliott's departure, Ruffin, as his surety, having been obliged to pay Vattier, called upon Vance for the payment of the note of Vance and Dill, which Elliott had left with Ruffin as a collateral security against the claim of Vattier. Vance was much surprised at this circumstance; and informed Ruffin, that he had made a verbal agreement with Elliott for the sale of a lot in Lawrenceburgh, and that he expected to pay the note in that way. Ruffin, hearing this, expressed his dissatisfaction with Elliott's conduct, and replied that he would let the matter rest for the present. After this, to wit, in 1807, Ruffin inquired of Percival as to what had become of Elliott, told him that he had paid the Vattier debt, and expressed some uneasiness about it. He also told Percival, that he had presented to Vance the note which Elliott had placed in his hands, but that Vance said he would plead the contract for the lot in bar of any suit upon the note. Ruffin, at the same time, inquired of Percival, if

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Elliott had not left any property which he could attach for the amount he had paid to Vattier. Percival, in reply, informed him of his having the note against Brown in favor of Elliott; which note he gave to Ruffin, and told him he could make his money out of that. Percival took a receipt from Ruffin for this note against Brown, and shortly afterwards wrote to Elliott, informing him of the circumstance.

In the December following, judgment was obtained at Cincinnati for 90 dollars and 12 cents, besides costs, in the name of Elliott against Brown, on the note thus delivered to Ruffin by Percival, the agent of Elliott. St. Clair was the attorney on record. This judgment, with the interest and costs, was collected on various executions issued during the years 1808, 1809, 1810, and 1811. The deputy sheriff states that, in 1810, the sheriff left with him sundry receipts on these executions; one by Thomas, which he thinks was signed by him as attorney, for 50 dollars and 50 cents; and two others by Ruffin, one for 5 dollars, the other for 20 dollars, signed by him, the witness believes, as agent for the plaintiff. The sheriff instructed

his deputy, in 1810, to pay any money he should [*205] collect on the *execution in this case, then in his

hands, to Ruffin; and it appears that the deputy applied to Ruffin for instructions relative to one of the executions, and was advised by him what to do. No instructions were ever given to the deputy, in this case, except by the sheriff and Ruffin. The two following receipts were given by Ruffin for money received by him on this debt against Brown: "Samuel Elliott v. Samuel Brown. Execution to December term, 1810. Cincinnati, October 12th, 1810, Received of Aaron Goforth, late sheriff of Hamilton county, the sum of 82 dollars in part of the above execution; 7 dollars of which were received of defendant, as per receipt given defendant. Signed, Wm. Ruffin." "Received, Cincinnati, 10th December, 1812, of Mr. Samuel Brown, the sum of 9 dollars, on ac-

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count of the claim of Samuel Elliott against said Brown. Signed, Wm. Ruffin."

In 1810, Elliott not having returned, Horner determined to collect by law, if possible, the money due to him from Elliott. Supposing the lot, numbered 171, in Lawrenceburgh, for which Elliott had formerly contracted with Vance, did really belong to Elliott, he sued out an attachment against him; and the same was accordingly levied upon that lot as Elliott's property. In June, 1811, judgment was obtained against Elliott on this attachment, in favor of Horner, for about 100 dollars. The lot however, which had been attached as Elliott's, was not sold; Horner having discovered, on inquiry of Vance, that Elliott had no title to it in law or equity; that his contract with Vance for the lot was a mere verbal one; that Elliott had not complied with the terms on his part; and that Vance did not consider him as having any right to the property whatever. Horner then consulted with his attorneys at law, as to the best means of securing his debt. The result of this consultation was, that as the lot had increased in value since Elliott's agreement for it, and would probably continue to do so, Horner should *perfect Elliott's title* to it, if Vance was willing, by complying with the terms which Elliott had agreed to perform; and after the title should be vested in Elliott, that Horner should levy his execution on the lot as Elliott's property, and become himself the purchaser at the sheriff's sale. Accordingly, Horner, with one of his attorneys, went to Vance and inquired of him whether he would be willing

[*206] to make the title for the lot to Elliott, if Horner *should pay up and fulfill Elliott's *contract*. To this Vance agreed. Horner then obtained from Ruffin, at Cincinnati, for 50 dollars, the note against Vance and Dill, by *delivery* merely, without indorsement. This note Horner gave up to Vance, and paid him the difference between the amount of the note and the original price of the lot; and Vance, immediately, to wit, on the

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10th of March, 1812, executed the deed for the lot to Elliott at Horner's request. As soon as this was done, Horner had the lot executed and sold as Elliott's *property*, purchased it himself at the sheriff's sale for 75 dollars, which sum was credited on his execution against Elliott, and then took possession of the premises. The object of this transaction was to accommodate and benefit Horner, and to enable Vance to get up his note.

In 1816, Armstrong, the complainant, purchased the lot from Horner for 300 dollars, entered into possession, and made valuable improvements; and, in 1819, having paid the consideration-money, he received from Horner a general warranty deed for the property.

Elliott, who had been absent from the country about thirteen years, returned to Lawrenceburgh in 1819, about the time of the execution of the deed by Horner to Armstrong. Not long after Elliott's return, the recorder called on him with the deed which had been made to him by Vance in his absence, and demanded the recording fee. Elliott at first refused to pay and take the deed, but on being sued by the recorder, he paid the fee before the trial, and received the deed. He soon afterwards, to wit, in 1819, brought an action of ejectment against Armstrong for the lot; and, in 1821, recovered a judgment against him, on the ground that the execution against Elliott, under which Horner had purchased the premises, was utterly void, and the sheriff's sale a nullity.

In 1823, Armstrong, for a valuable consideration, released Horner from the covenant of warranty, contained in Horner's conveyance to him of the premises in dispute.

This statement, we believe, contains all the material testimony given in the cause. The decree of the Circuit Court is in favor of the complainant, requiring the defendant to convey to him the legal title to the lot, [*207] and enjoining him from *proceeding any further at law, &c. The defendant appeals to this Court.

The complainant in this suit admits, that the *legal title*

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to the lot which he claims is vested in the defendant. But it is contended that the *beneficial property* is in the complainant; and that the defendant is bound to convey to him the *legal estate*. It is not to be questioned, but that the quality of separability of the *use* from the *legal title*, as contended for by the complainant, does exist in real property. One man may certainly have the legal estate merely as a *trustee*, whilst another, called the *cestui que trust*, has a right, in equity, to demand the rents and profits and a conveyance of the legal title. This *trust-estate* in real property, as separate from the *legal ownership*, may either be created by an express declaration of the trust; or it may be raised upon certain facts by implication of law. The statute of frauds requires all declarations of trust in land to be *proved by* written testimony; but those trusts which arise by the mere operation of law, are excepted out of the statute, and may be proved by parol evidence. The complainant here does not rely upon any express declaration of trust in favor of his grantor. He goes upon the ground, that Horner paid the consideration for the lot; and that, by virtue of such payment, although the deed was made to Elliott, a trust resulted to Horner by implication of law. And there is no doubt but that the law upon this subject is, that if A. purchased land *with his own money*, and the deed be made to B., a trust results in favor of A.; provided there be no circumstances in the case to rebut this presumption of the law.

Some of the points taken by the defendant, in opposition to the complainant's demand, are very easily disposed of. He contends that Horner should have been a party, either complainant or defendant. The suit is by Armstrong, the grantee of Horner, against Elliott. There existed no interest of Horner, therefore he needed not to be a party complainant; and, as there was nothing demanded of him, there was no occasion for his being a party defendant. *Kerr v. Watts*, 6 Wheat. 550, 559. In

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the case where an assignee of a mortgage brings a bill of foreclosure, it is held that the mortgagee need not be a party. *Whitney v. M'Kinney*, 7 Johns. Ch. Rep. 144, 147.

We think there is nothing in this objection. [*208] The ground relied on *by the defendant, that his parol contract with Vance gave him an equitable estate, and that Horner was a purchaser with notice, has no foundation. If that contract of 1805 was originally binding on the vendor, we have no idea that it could remain so, after the defendant had pledged the note at Cincinnati, which was to have been given up as the greater part of the consideration for the lot; and after he had absented himself from the country for 7 years, without having paid or offered to pay any part of the consideration. 1 Maddock's Ch. 328. It is contended that, assuming Horner to be the *cestui que trust*, he could not sell the property to the complainant as set out in the bill. The law, however, is perfectly settled, that the estate of a *cestui que trust* may be conveyed as well as any other. 1 Cruise, 493. The defendant relies upon the release by the complainant to Horner. That release, however, is merely of the covenant of warranty in Horner's deed to the complainant, and leaves the case just where it would have been, had the deed originally contained no covenant of warranty. The conveyance of the estate is as valid without that covenant as with it. Another ground taken by the defendant is, that when Horner purchased the lot at the sheriff's sale under his judgment against Elliott, his trust-estate, if he had any, was merged in the legal title thus acquired. The answer to this objection is, first, that if Elliott was a bare *trustee*, the estate was not subject to the execution against him; 1 Maddock's Ch. 363; 1 Cruise, 542; secondly, that the sale was at any rate a nullity, and vested no property in the purchaser, the execution being void. Such was the decision of this Court, in a case between these same parties, at the November term, 1822. Horner therefore acquired, under the sher-

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iff's sale, no legal title by which his equitable right, if he had any, could have been merged.

These comparatively unimportant matters, introduced into the argument by the defendant, being thus disposed of, we come now to an examination of the substantial merits of the cause.

There are two principal questions involved in this suit: First, did Horner pay the consideration, or any part of it, for the lot in dispute, *out of his own money*? And if so, then, secondly, is the presumption of law, thus raised in favor of Horner, destroyed by any rebutting evidence on the part of the defendant?

Previously to our examining these questions, it [*209] may be *proper to observe, that some of the depositions contain the general expressions, that Horner paid the whole of the consideration-money, and that the deed was made to Elliott for the sole benefit of Horner. If these general expressions stood alone, they would probably settle the case, at once, in the complainant's favor; notwithstanding the deed states upon its face that the consideration was paid by the defendant, and the answer denies the trust. *Boyd v. M'Lean*, 1 Johns. Ch. Rep. 582, 586. These expressions, however, are explained and modified in other parts of the same depositions. We find that when these witnesses say that Horner paid the consideration-money, they mean that he paid it by getting the note against Vance and Dill from Ruffin, delivering it up to Vance, and paying the difference between the note and the price of the lot. And when they say, that the deed was made for Horner's benefit, their meaning is, that the absolute title was vested in Elliott to benefit Horner, by thus rendering the lot subject to his judgment against Elliott.

The first subject for our inquiry is whether Horner paid *out of his own money* the consideration for the lot?

With respect to this point, the testimony is clear that a promissory note, given many years before by Vance and

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Dill, and payable to Elliott *or order*, was delivered up to Vance by Horner, as the principal part of the consideration for the lot. But it is a great matter of dispute between the parties, as to whom that note properly belonged at the time it was so delivered up to Vance; to wit, in October, 1812. The complainant contends that it was the property of Horner. It is in proof that, in 1806, this note against Vance and Dill was *delivered* by Elliott to Ruffin, without endorsement, as a collateral security; to be collected by him, in case he should have to pay the debt of about 66 dollars due to Vattier. This was certainly no sale of the note to Ruffin. It was a mere pledge for the security of a debt; and the general property of the note, at all events, continued in Elliott. By this pledge, Ruffin, at most, had but the special property and the right of possession, which belonged to a bailee; and even after he had paid Vattier, probably in 1807, he was only entitled to collect the note in Elliott's name, and pay himself for his advance to Vattier, out of the proceeds.

In 1812, this pledged note was sold by Ruffin, [*210] the pledgee, to *Horner; and it is upon this sale alone that Horner's right to the note, when he delivered it to Vance, is founded. That Ruffin had no power to sell this note in 1812, is contended for by the defendant; on the ground that Ruffin had been, a year and a half before, repaid the debt for which the note was pledged. It is evident from Ruffin's calling upon Vance in 1807 for payment, and from his inquiries of Percival in the same year, if Elliott had left any property that he could attach, that Ruffin was determined to be repaid very soon, if possible. We have the positive testimony of Percival, the defendant's agent, that when thus inquired of by Ruffin, to wit, in 1807, he gave him the note against Brown, which was for 87 dollars and 50 cents, and told him to make his money out of that. It is proved that afterwards, in the same year, a judgment on this note against Brown was obtained in Elliott's name at Cincin-

nati, where Ruffin lived; that when the sheriff gave to his deputy an execution in the case, he directed him to pay over to Ruffin any money he might collect on it; that the deputy sheriff asked and received instructions in this business from Ruffin; and that the whole amount of this judgment against Brown was finally collected on execution, during Elliott's absence from the country. We have also in evidence the receipt itself to the sheriff for 82 dollars signed by Ruffin, dated long before his sale to Horner of the pledged note, to wit, the 12th of October, 1810, and expressed to be in part payment of the execution in this case. These are strong proofs of the re-payment to Ruffin, in the manner and at the time alleged by the defendant.

The complainant has attempted to weaken the force of this testimony, by the deputy sheriff's statement, that he had seen a receipt for 50 dollars and 50 cents in the case against Brown, given by Thomas, he thinks, as attorney; and by Horner's deposition, that Ruffin had told him that what money he had received on the judgment against Brown, he had paid to Percival. These circumstances amount to nothing. The receipt of Thomas was not produced, nor was its absence accounted for. Besides Thomas' authority does not appear, St. Clair being the only attorney on record. As to what Horner says, relative to Ruffin's telling him that he had paid to Percival the money due from Brown, it is mere hearsay testimony.

[*211] Ruffin himself was *a witness in the cause; and if he had not received or retained the money, for which he receipted to the sheriff, *he* was the proper person to be called on to explain the transaction. Percival, too, was a witness, and *he* could have told whether Ruffin had ever paid to him this money. The complainant, however, did not think proper to ask either Ruffin or Percival a single question on this subject; and he must consequently submit to the presumption against his second-

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any evidence, which the want of that inquiry necessarily creates.

The defendant's evidence, therefore, on this part of the case, stands unimpeached, and settles the fact, that in 1810 Ruffin received 82 dollars from Elliott's judgment against Brown. That amount was at least equal to Ruffin's claim for having paid the debt due to Vattier; which, in 1807, did not exceed 66 dollars. It follows, that in 1810 the debt was paid to Ruffin, to secure which the note against Vance and Dill had been pledged to him. That payment to Ruffin put an end to his control over, the pledged note. From the time of that payment, the absolute right of property and the right of possession in the note, were vested in Elliott. The consequence is inevitable,—the sale of the note in 1812, about a year and a-half after the payment of the debt for which it was pledged, was made by Ruffin to Horner without authority, and this unlawful conversion of Elliott's property subjected Ruffin to an action of trover.

Perhaps, however, it may be said that Horner, by the purchase from Ruffin for a valuable consideration, became the owner of the note, although Ruffin, at the time had no property in it, nor any authority to sell it. In the sale of personal property, not in market overt, the general rule is, that though the purchase be *bona fide* and for value, the purchaser can receive no better title than that of which the seller was possessed; and must, at all times yield to the claim of the rightful owner. To this general rule, however, there is an exception in favor of negotiable instruments, such as bills of exchange and promissory notes. When these are originally made payable to bearer; or when, in the first instance, they are payable to order and afterwards by a blank endorsement become payable to bearer; they pass by *delivery*; and the purchaser of them who uses due caution, pays a valuable consideration, and

takes them in the course of business, has a good [*212] title against all the *world, whether the seller had

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any title or not. *Wookey v. Polc*, 4 Barn. & Ald. 6. Upon looking at this note, which was pledged to Ruffin and sold by him to Horner, we find at once, that it is not that kind of negotiable instrument which comes within the exception in favor of commerce. It was payable only to Elliott or order, and Elliott had not endorsed it, nor had any person for him; consequently it was not payable to bearer, and could not, like a bank note, be transferred by a bare delivery. Whether the property in this note could pass without endorsement, under any circumstances, need not be considered. Supposing it could, the transfer in such case must be governed, not by commercial law, but by the rules which regulate the sale of ordinary goods, out of market overt. Horner could receive no better title than Ruffin had. The buyer was not liable to any imposition in this case, the want of Elliott's endorsement being sufficient notice that the note was still his; and when Horner bought it, he did so at the risk of Ruffin's having no authority to sell it. This would be the case, even if Ruffin had endorsed the note in Elliott's name, having no authority to do so; because the law is, that if one man acts by the authority of another, those dealing with him must look to his authority. *De Douchout v. Goldsmid*, 5 Ves. Jun. 211. This part of our case is explained by the following authority: Maclish being owner of a ship, let it to the commissioners of the navy; and by a letter of attorney empowered Todd to receive the profits, give discharges, and do every thing relative to the premises which Maclish could do. Todd received from the commissioners of the navy, a navy bill for 1200 pounds payable to Maclish or his assigns; and sold it to Hawkes for a fair price; and Hawkes for a fair price sold it to Ekins. Maclish afterwards brought an action of trover against Ekins and recovered. The Court observed that it had been truly said, that the property in a bank note, if delivered in the course of trade for valuable consideration, does pass by delivery; but that it is as true, that the

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property in a navy bill can not pass without assignment; as Todd had no power to assign the bill, the maxim *caveat emptor* applied to the case. *Maclish v. Ekins*, Sayer's Rep. 73.

With respect to this part of the case, therefore, it appears to us, that at the time of the sale of the note against Vance and Dill by Ruffin to Horner, to wit, in [*213] 1812, the debt had been *paid for which the note was pledged, and that the right both of property and of possession in it was then in Elliott; that Ruffin had no authority to dispose of the note; and that as it was payable *only to order*, and was not endorsed, Horner acquired no property in it, although he paid for it a valuable consideration.

As the delivering up of this note to Vance, formed the greater part of the consideration for the lot in dispute; and as the payment of that consideration by Horner out of his own money, is the foundation of the complainant's bill, this decision—that *Horner never had any property in that note*—goes very far towards settling the whole of this case.

The trifling balance of the consideration for the lot, was paid by Horner out of his own money. Whether the smallness of this sum is any objection to the complainant's following it into the lot, if he be otherwise entitled, we shall not stop to inquire; but we will take it for granted that it is no objection. This introduces the second principal subject of inquiry, which is, whether the *presumption* of a trust to Horner, arising from this payment, is rebutted by the defendant's evidence?

From an examination of the testimony, it appears to us that the object of Horner, in paying this little balance to Vance, was not to make a purchase from him of a beneficial estate in the lot in proportion to that amount. It seems to have been paid for Elliott by Horner, merely to induce Vance to perform his contract with Elliott by conveying to him the *absolute title*, and thus to cause the lot

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to be made subject to Horner's judgment against Elliott. The following extract from the deposition of Horner's attorney very clearly explains this part of the case; though the occasion, really, seems not to require so particular reference to it:

"In 1810, or 1811, after this deponent had commenced the practice of law, he, together with Symmes, was employed by Horner to sue out and conduct an attachment against Elliott, either as an absconding or non-resident debtor; and they prosecuted the suit to final judgment, which was obtained in June, 1811. In March, 1812, Symmes, Horner, and the deponent, consulted together on the best probable method of securing Horner's debt; and inasmuch as lots in Lawrenceburgh had then considerably increased in value, and might still increase, they concluded Horner's best method would be to perfect Elliott's title to the lot, if Vance would consent, and then to execute and sell, and become the purchaser. Horner, the deponent, and perhaps Symmes, went to Vance, and inquired of him whether, if Horner paid up and fulfilled Elliott's contract, he, Vance, would make the title to Elliott? After some conversation with Vance, and perhaps some persuasion from the deponent, Vance consented, more especially as the deponent urged the matter as the only method likely to secure Horner. Horner then went to Cincinnati, and purchased the note against Vance and Dill (as deponent supposed, because he returned from thence with the note in his possession). He delivered the note to Vance, and paid the residue of the purchase-money for the lot, which was in all perhaps 75 dollars. We then executed and sold the lot as Elliott's property, to wit, lot number 171, in the town of Lawrenceburgh, and Horner became the purchaser for 75 dollars, as the deponent believes."

This deposition certainly shows that here was no new bargain and sale between Vance and Horner. It was the merely carrying into effect the old contract between Vance

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and Elliott. This, it is true, was to be for Horner's benefit ; not, however, by vesting in him the beneficial estate in any part of the lot, because the performance of Elliott's contract could not do that ; but it was to be for his benefit, by vesting in Elliott the beneficial as well as the legal interest and so rendering the lot subject to Horner's judgment against him. No words could make the matter plainer than this deposition does. The resulting trust, contended for by the complainant, is, in the language of Lord Mansfield, a kind of *arbitrary implication* raised, to stand until some reasonable proof brought to the contrary. Sugd. 418. Supposing that the payment of the small balance of the consideration, had it stood alone, would have raised a *presumption*, that the deed, though made to Elliott, gave a beneficial estate in the lot to Horner in proportion to that small sum ; yet, undoubtedly, this *mere presumption* of law must yield to the *truth* of the case, when it is shown by positive testimony, that the object of Horner in making this payment was, in direct opposition to such a *presumption*, to cause the beneficial estate to be vested in Elliott conformably to the face of the deed ; and when it is shown, too, that after the execution of the deed, *Horner treated the lot as Elliott's property, by having his execution levied upon it as such, and buying it himself at the sheriff's sale.

This management of Elliott's business for him in his absence, by Horner, was ratified by Elliott soon after his return to the country ; and the special benefit which had been contemplated by Horner, was thus confirmed to him. Upon Elliott's acceptance of the deed, the case stood precisely as if his contract with Vance had been completed by himself in person, instead of by Horner for him. By this recognition, Elliott became accountable to Horner for the balance of the consideration over and above the note, which had been advanced for him ; and the liability of the lot, as Elliott's property, to Horner's judgment

against him, from the date of the deed, was thereby established.

It appears to us, therefore, that the facts accompanying the small advance of money by Horner for Elliott, repel the idea of any implied trust *pro tanto*, in favor of Horner, on account of that payment. Indeed, it seems perfectly clear, that it was 8 or 10 years, at least, after Vance's deed to Elliott, and when the sheriff's sale to Horner had been determined to be void, and after Elliott had recovered the premises in the action of ejectment, that the complainant, looking around for a plank in the shipwreck, was the *first* to think of the resulting trust set out in his bill.

It may be supposed, perhaps, that we should notice, before we conclude, the suggestions of mistake and fraud, made by the complainant for the purpose of showing that the defendant has no right to resist the claim of a resulting trust set up in the bill. It is true, that Horner was under a mistake in supposing the lot to be Elliott's, when he levied his attachment; but it is also true, that before he had thought of completing Elliott's contract, that mistake was rectified, since he had discovered before that time, as he states himself, and as the bill states, that Elliott had no title at law or in equity. As to the idea of Horner's mistake of judgment in not causing the deed to be made to himself, instead of to Elliott, we have nothing to do with that. We will observe, however, that as the note was Elliott's at the time, the policy of taking the

deed to Horner was not so clear as the complainant imagines. It is further contended that there is a fraudulent concealment, by the defendant or his agent, of the claim now set up against the alleged trust. We have not been able, however, to discover any fraud in the case. The defendant was absent himself, and knew nothing of the proceedings. If his agent saw the complainant buying the lot, and making improvements on it, he might honestly think, as the complainant did,

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that the sheriff's sale to Horner was valid, and that Elliott had no further claim. There is no proof that the discovery of the execution's being void was made until after Elliott's return and acceptance of the deed in 1819, nor indeed at any time before the commencement of his action of ejectment.

From the general view which we have now taken of this cause, we have come to the conclusion that the greater part of the consideration of the lot was the property, not of Horner, but of the defendant; and that the small balance of it, paid by Horner, was paid under circumstances which entirely rebut the presumption of a resulting trust. We are also of opinion that there was no mistake or fraud that can have any influence on the case. The consequence is, the complainant is not entitled to the relief prayed for, and the Circuit Court should have dismissed his bill upon the merits. The decree of that Court in favor of the complainant is erroneous, and must be reversed.

Per Curiam.—The decree is reversed with costs. Cause remanded, with directions to the Circuit Court to dismiss the bill, &c.

Caswell, Starr, and Dunn, for the appellant.

Lane and Stevens, for the appellee.

WASHBURN and Another v. PAYNE.

JUSTICE OF THE PEACE—JURISDICTION—AMOUNT.—In an action of debt before a justice of the peace, on a bond in the penalty of 175 dollars conditioned for the delivery of property, the plaintiff, in the statement of his demand, claimed 81 dollars and 25 cents: *Held*, that the justice had jurisdiction; the sum actually demanded not exceeding 100 dollars (a)

APPEAL from the Vigo Circuit Court.—This was an action of debt by Payne against Washburn and Richardson.

(a) Post 237; 7 Blkf. 343; 6 Ind. 344; 59 *Id.* 287; 6 Blkf. 425.

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[*217] *SCOTT, J.—On a bond for 175 dollars, with condition for the delivery of certain property, an action was brought before a justice of the peace. The plaintiff below in stating his cause of action before the justice, claimed 81 dollars and 25 cents, and had judgment to that amount. Defendant appealed to the Circuit Court, and thence to this Court. The statute of 1827 gives jurisdiction to a justice of the peace, where the sum *due* or *demand*ed shall not exceed 100 dollars. From the phraseology of the statute, we are of opinion that the intention of the general assembly was to regulate the jurisdiction of a justice of the peace, not by the amount named in the bond, on which suit might be brought, but by the amount actually claimed or demanded by the plaintiff. The amount claimed in this case, and alleged to be due to the plaintiff, is 81 dollars and 25 cents. This sum is clearly within a justice's jurisdiction under the statute. For this sum judgment was rendered by the justice, and that judgment was correctly affirmed by the Circuit Court (1).

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

Judah, for the appellants.

Kinney, for the appellee.

(1) "In all actions of *debt* or *assumpsit*, wherein the sum *due* or *demand*ed shall be over 50 dollars and not exceed 100 dollars, exclusive of interest and costs, justices and Circuit Courts shall have concurrent jurisdiction." R. C. 1831, p. 297.

RENO v. CRANE.

EVIDENCE—ENTRY—PARTNERSHIP.—*Held*, that an entry in the partnership books by one of the partners in the business of a saw-mill, charging himself with a boat which he had built at the mill,—might be introduced by him as evidence, *inter alia*, to prove the boat to be his individual property.

Reno v. Crane.

ERROR to the Jackson Circuit Court.

HOLMAN, J.—Replevin by Reno for a boat. The defendant pleaded property in himself. Verdict and judgment for defendant. A bill of exceptions shows, that the defendant proved by several witnesses, that he [*218] built the boat at Fischli's mills; *and that while he was building it, he frequently declared that he was building it for himself; that the materials for the boat were sawed at said mills; and that the boat was finished in December, 1826. The plaintiff proved, that the defendant and Fischli were partners in the mills at the time the boat was built; and that the partnership extended to all the business that was transacted at the mills; that the partnership expired on the 1st January, 1827; about which time the defendant removed from the mills, leaving the boat on the premises in the care of his agent; that Fischli, the other partner, came into the sole possession of the premises directly after the defendant removed, and sold the boat to the plaintiff in January, 1827, for the sum of 50 dollars. The defendant then offered to read from a book, said to be the account book of Fischli and Crane, and endorsed ledger No. 1, a charge entered in said book in his own hand-writing, dated the 28th of December, 1826, charging himself with the said boat at 60 dollars, after proving by one witness, (who examined the said book and found an account against himself,) that he believed the book to be the account book of Fischli and Crane; and by another, that the book was principally made out by him in his hand-writing; that in May, 1826, at defendant's request, he made out part of the book and finished the residue, so far as was done by him, in the ensuing December; that it was a copy of the original book of entries of Fischli and Crane, and was selected from day-books, blotters, and documents, some of which were in Fischli's hand-writing, and was an exposition of the whole concern. The plaintiff objected to the reading of the entry from the book, but

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the Circuit Court admitted it in evidence to the jury; to which the plaintiff took his exceptions.

The defendant, it seems, was the active partner in this firm, and transacted the principal part of the business, and kept the entire account; and anything that he in good faith purchased of the partnership property, became exclusively his. The entry of the purchase of the boat in the partnership books, though in his own hand-writing, might be introduced, among other circumstances, to show that the boat was his, although built as the joint property of the firm. The evidence relative to the book strongly conduces to show that it was the true account book of the firm; and as the bill of exceptions [*219] nowhere states that the *whole of the evidence is set forth, the presumption is conclusive in favor of the opinion of the Circuit Court.

Per Curiam.—The judgment is affirmed with costs.

Hawk, for the plaintiff.

Nelson and Farnham, for the defendants.

MILLAR v. FARRAR.

ERROR—ANSWER—IN PART.—If a plea, in bar of a writ of error, answer only a part of the errors assigned, it is bad on demurrer (a).

SAME—RELEASE—PRACTICE.—A release of errors, executed for the purpose of procuring an injunction, may be pleaded in bar of a writ of error, although the injunction had been refused and the bill dismissed.

ERROR to the Dearborn Circuit Court.

HOLMAN, J.—Farrar obtained a judgment against Millar, on scire facias, in the Dearborn Circuit Court, the record of which was afterwards consumed by fire. A motion was made, agreeably to the act of assembly, to reinstate said judgment; and the judgment was reinstated

(a) 59 Ind. 483; 51 *Id.* 69.

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accordingly. To reverse which this writ of error is prosecuted. Errors are assigned in the original judgment, in the notice to reinstate the judgment, and in the judgment as reinstated.

The defendant in this Court pleads, first, in nullo est erratum. Secondly, a release of all errors in the judgment on scire facias. And thirdly, that after the rendition of the judgment on scire facias, and after the rendition of the judgment on the motion aforesaid, and after the reinstating of the said judgment, the said Millar made his release in writing, sealed with his seal and filed in the clerk's office of the Dearborn Circuit Court as required by law; a copy whereof duly authenticated, &c., is to the Court now shown, whereby he released all errors in law in the proceedings, rendering, and final restoration of said judgment; and this he is ready to verify, &c. The plaintiff demurs to the second plea. To the third plea he replies, that the release in said plea alleged was executed by him, at the time in said plea mentioned, for the purpose of procuring an injunction to stay further proceedings on said judgment at law, and for no other consideration whatever; and he avers that he wholly [*220] *failed to procure an injunction, and that he has since dismissed his bill in which said injunction was prayed; and this he is ready to verify, &c. To this replication the defendant demurs.

The second plea is not good. It is pleaded in bar to the writ of error, but it only answers to a part of the errors assigned. The plaintiff's demurrer must therefore be sustained. The release set forth in the third plea covers the whole assignment of errors. The case therefore rests on the validity of that release. That release, it seems from the pleadings, was a statutory release, filed in the clerk's office for the purpose of obtaining an injunction; and the plaintiff contends that as he did not obtain an injunction, and afterwards dismissed his bill, that the release is not obligatory on him. In support of this posi-

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tion he relies upon the case of *Clark v. Goodwin*, 1 Blackford, 74. But the release in that case had no legal resemblance to this. That release was not under seal; it did not comply with the statute; and for the purpose for which it was filed it was a nullity. As the party that executed it could not legally obtain any advantage by virtue of it, no principle of law would authorize it to be set up against him as an effective release. Here the release, under the pleadings, must be considered as good and valid in itself, and when filed it was completely operative for all the purposes for which it was executed. It immediately inured to the plaintiff's benefit to the full extent contemplated by law; that is, it removed one statutory barrier out of his way in obtaining an injunction. If through some neglect of other statutory requisitions, or a want of equity, he failed to obtain the contemplated relief, that failure could not have a retrospective effect and render the release inoperative. The release still remains in full force, and the plaintiff by virtue thereof may even now, or at any time hereafter, obtain an injunction to stay any proceedings that may be had on that judgment, provided he complies with the other necessary prerequisites. The release is therefore well pleaded against him, and is a bar to the writ of error.

Per Curiam.—The writ of error is barred, with costs.

Test, for the plaintiff.

Dunn, for the defendant.

[*221] GALLETLY v. THE BOARD OF JUSTICES of Owen County.

TITLE-BOND—TENDER OF DEED.—In an action on a title-bond conditioned to make a deed for real estate on payment of the purchase-money, the declaration averred a payment of the money and a failure to make the deed. Plea, that, before the commencement of the suit, the defendant

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had tendered the deed, which was refused; that he had always been ready, and was still ready, &c. *Held*, on demurrer, that the plea was good; it not appearing but that the payment was made on the day the deed was tendered (a).

ERROR to the Owen Circuit Court.

SCOTT, J.—Samuel Fain, as county agent, gave his bond to make Galletly a deed for a lot in the town of Spencer, on the payment of the purchase-money; with a proviso, that no deed was to be made prior to the 17th of October, 1822. At the May term, 1828, Galletly brought suit on the bond, and assigned as a breach that he had fully paid the price of the lot, yet the said agent, though often requested, had not made the deed, &c. The defendants pleaded a tender of the deed before the commencement of the suit, to wit, on the 16th of May, 1827, and a refusal by the plaintiff to accept the same, and that since that time they have been always ready and are still ready, &c. Demurrer to the plea, and joinder, and judgment for the defendants. The record shows no failure on the part of the defendants. No time is mentioned in the declaration when the alleged payment was made. For aught that appears in the record, it might have been on the same day on which the deed was tendered. The demurrer was correctly overruled (1).

Per Curiam.—The judgment is affirmed with costs.

Kinney, for the plaintiff.

Whitcomb, for the defendants.

(1) The plaintiff, in the case in the text, could not recover, unless he had demanded a deed before the commencement of the suit. *Vide Sheets v. Andrews*, Nov. term, 1829, post.

[*222] *HOTCHKISS v. LYON and Others.

EVIDENCE—ADMISSION.—A. entered into partnership with B. in the business of tanning; and C. bound himself in a covenant to B. for A.'s con-

(a) 5 Ind. 517; 57 *Id.* 34; 34 *Id.* 174; 25 *Id.* 168; 4 *Id.* 224.

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duct as a partner for a certain time. *Held*, that, in an action by B. against C. on the covenant, the admissions of A., made after the expiration of the stipulated time, were not admissible as evidence against C.

ERROR to the Vigo Circuit Court.

HOLMAN, J.—Lyon, Allen, and Creal, as the sureties of Burnett, covenanted with Hotchkiss, that said Burnett, whom Hotchkiss had taken as a partner in the business of tanning, should faithfully discharge his duty as such partner, and fully account, &c., with the said Hotchkiss for and during the term of two years from the 11th of January, 1823. To a declaration on this covenant for breaches in the year 1823, the defendants pleaded, among other pleas, that said Burnett did discharge all the duties that they had covenanted that he should discharge, &c.; on which issue was taken. On the trial, as appears by bills of exceptions taken by the plaintiff, the Circuit Court refused to admit the plaintiff to give in evidence the admissions of Burnett, made in the year 1825, that a certain book offered in evidence, was the account book of the partnership between the plaintiff and Burnett; and also refused to admit evidence of the declarations of Burnett, made in 1825, that he had received certain hides, &c. The defendants obtained a verdict and judgment. The plaintiff appealed to this Court.

The admissibility of Burnett's declarations as evidence against the defendants, presents the only question in dispute. In the case of *The Governor v. Shelby*, November term, 1826, we decided that a judgment against the sheriff was no evidence against his sureties for the same demand. The cases uniformly support that decision. There are some cases which were urged by the plaintiff in that case, and which are relied on in support of this appeal, that are clearly inapplicable. They decide, that when a party who is ultimately liable, has notice of a suit against an intermediate party, he is bound by a decision against that intermediate party, and can not afterwards controvert it. But a judgment against a prin-

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principal is in no case conclusive against a surety, no matter on what ground that judgment has been [*223] given. *In this case judgment against Burnett even by confession, would have been no evidence against his sureties; but a judgment against the sureties would have been conclusive against Burnett if he had been legally notified of the action. The defendants were bound for the conduct of Burnett, during the term for which they had covenanted, but not for what he might, after a lapse of several years, be induced to say in relation to his conduct during the stipulated term. It is true that, while the principal is acting, his declarations may be so interwoven with his acts, as to stand in direct connection with them, and form a part of the *res gestæ*, but when he ceases to act, his subsequent declarations have no direct connection with his preceding acts, so as to bind his sureties. The authorities on this subject place the matter beyond dispute. In *Evans v. Beattie*, 5 Esp. R. 26, it was decided, that if A. guaranty the payment of such goods as B. shall deliver to C., the declaration of C. of his having had goods is not admissible to prove the fact against A. The delivery of the goods must be proved. See also the cases of *Bacon v. Chesney*, 1 Stark. R. 192; *Dunn v. Slee*, Holt's Cas. 399; *Beall v. Beck*, 3 Har. & M'Henry, 242; *Respublica v. Davis*, 3 Yeates, 128; 3 Stark. Ev. 1386. We are therefore of opinion that the evidence was properly rejected.

Per Curiam.—The judgment is affirmed with costs.

Dewey, for the plaintiff.

Kinney, for the defendants.

WILSON v. OATMAN.

DOWER—IN IMPROVEMENTS.—After the alienation of real estate, and before the death of the grantor, the value of the estate was greatly enhanced

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by improvements made by the grantee. *Held*, that the dower of the grantor's widow should be assigned according to the value of the property at the time of the alienation (a).

SAME—VALUE—CONVEYANCE—TITLE-BOND.—A title-bond, conditioned for the conveyance of real estate on payment of the purchase-money, was executed, and possession at the same time given to the obligee. The purchase-money was afterwards paid, and a title obtained by the purchaser. *Held*, that the date of the bond must be considered the period of alienation, in estimating the value of the property with a view to the dower of the obligor's widow.

ERROR to the Floyd Circuit Court.

BLACKFORD, J.—George Oatman, the husband of [*224] the *defendant in error, was seized in his life-time of 67 acres and a-half of land, in Floyd county. On the 18th of March, 1816, Wilson, the plaintiff in error, purchased this land from Oatman, received a bond conditioned for a title to be made on payment of the purchase-money, and was put into possession of the premises. The payment of the purchase-money was completed in March, 1819. Oatman died in 1821, without having executed a deed to Wilson. In 1824, Wilson applied to the Probate Court, and obtained the legal title for the land, according to his bond. At the date of the title-bond, to wit, in 1816, the only improvements on the land were two small cabins, and about 6 acres cleared and fenced. But previously to Oatman's death, which was in 1821, Wilson had cleared and improved 40 acres of the land fit for cultivation; planted an orchard; and erected buildings worth 3,000 dollars. In 1827, the widow Oatman, who is the defendant in error, brought the present suit to obtain her dower; and commissioners were accordingly appointed, under the statute, to assign and set it off to her. In the appointment of the commissioners, the Circuit Court directed them that, in their assignment of the dower, they should take into consideration the situation of the premises, at the time of the decease of the husband. The commissioners upon an examination of the premises, were of

(a) 3 Ind. 343.

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opinion, that no division of the property could be made by metes and bounds. They, therefore, assigned the dower specially, agreeably to the statute, by allowing to the doweress the one-third of the annual value of the premises, to wit, 50 dollars, to be paid to her annually during her life. In fixing upon the amount of the dower, the commissioners were governed by their estimate of the value of the property at the time of Oatman's death, including the improvements made by Wilson, the plaintiff in error, subsequently to the date of his title-bond, and of his being put into possession. The report was objected to by Wilson, but was confirmed by the Circuit Court; and there was judgment accordingly.

The only error assigned is, that the amount of the dower was determined, by estimating the value of the land, with the improvements, at the time of the husband's death; whereas, it is contended, it should have been determined, by an estimate of the value at the date of the bond. The law may be considered as settled, that [*225] in case of alienation of the land by the *husband, the time when the husband alienated the estate, not that of his death, is the proper period at which to estimate the value of the property, with a view to dower. *Hale v. James*, 6 Johns. Ch. Rep. 258. In the case we are considering, the purchase was made, the title-bond given, and the possession delivered, on the 18th of March, 1816; though the deed was not executed until it was directed to be executed agreeably to the contract, by an order of the Probate Court, in 1824, some years after the husband's death. Under these circumstances, we think, that the execution of the deed must relate back to the time of the original contract and possession; and that the date of that contract must be considered to be the period of alienation, in estimating the value of the property with a view to the dower of the defendant in error. If the improvements, made by the purchaser subsequently to his contract and possession, were to be taken into considera-

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tion in the estimate of dower, in cases like the present, the rule would tend to discourage the making of improvements, and would be contrary to the policy of the country.

(1). The judgment of the Circuit Court, therefore, confirming the report of the commissioners, together with so much of the order by which they were appointed, as directs them in their assignment of the dower, to take into consideration the situation of the premises at the time of the death of the husband, must be reversed; and the cause remanded for further proceedings.

Per Curiam.—The judgment is reversed, and the proceedings, &c., are set aside, with costs. Cause remanded, &c.

Nelson, for the plaintiff.

Farnham, for the defendant.

(1) Judge Story, in a case on this subject, speaking of C. J. TILGHMAN'S opinion in *Thompson v. Morrow*, 5 S. & R. 289, says: "In his own language I can state, that 'with respect to dower, I have found no adjudged case in the Year Books, confining the widow to the value at the time of the alienation by her husband, where the question did not arise *on improvements made after the alienation*, and that having considered all the authorities which bear upon the question, I find myself at liberty to decide according to what appears to me to be the reason and the justice of the case, which is, *that the widow shall take no advantage of the improvements of any kind made by the purchaser, but throwing those out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her.*' This doctrine appears to me to stand upon solid principles, and the general analogies of the law. If the land has, in the intermediate period, risen in value, she receives the benefit; if it has depreciated, she sustains [*226] the loss. Her title is consummate by her husband's death, and in the language of Lord Coke, that 'title is to the quantity of the land, viz. one just third part.' If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For practical purposes, it is impossible to make any distinction between the value of the improvements and the value resulting from the improvements; between improvements which operate on a part of the land, and those which operate upon the whole." *Powell v. The M. & B. M. Co.* 3 Mason, 347, 374.

Chancellor Kent says: "The better, and the more reasonable general American doctrine upon this subject, I apprehend to be, that the improved value of the land, from which the widow is to be excluded, in the assignment of her dower, even as against a purchaser, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes." 4 Kent's Comm. 2 Ed. 68.

Land is mortgaged by the husband, who continues in possession and

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makes improvements. The equity of redemption is afterwards foreclosed or released. In estimating the wife's dower, the value of the improvements must be taken into consideration; the date of the foreclosure or release being deemed the period of alienation. 4 Kent's Comm. 2 Ed. 66.

M'GLIMMERY v. BRUSH, in Error.

SLANDER—PLAINTIFF'S WIFE—EVIDENCE.

AN action of slander was brought by Brush against M'Glimmery, for words charging the plaintiff with stealing, and for words charging him and his family with murder. The defendant pleaded not guilty. *Held*, that words charging the "Brush family" with stealing, or with murder, might be proved by the plaintiff to show malice; but that no slanderous words spoken of the plaintiff's wife alone were admissible as evidence in this action.

THE STATE v. COOPER and Others.

RECOGNIZANCE—INDICTMENT—REQUISITES.—A., B., and C. entered into a recognizance for A.'s appearance on the first day of the term of the next Circuit Court, to answer a charge of larceny. On the first day of the term A. failed to appear. He also made default on the second day, when the recognizance was declared forfeited, and a scire facias issued thereon returnable to the next term. Plea to the scire facias, that no presentment or indictment had been found against A., though since the date of the recognizance, two grand juries had been impaneled. *Held*, on demurrer, that the plea was insufficient (a)

[*227] *ERROR to the Owen Circuit Court.

HOLMAN, J.—E. Cooper, I. Cooper, and H. Matheny, entered into a recognizance, conditioned that E. Cooper should be and appear before the Owen Circuit Court, on the first day of the next term of that Court, to answer to

(a) 25 Ind. 384; 6 Blkf. 212.

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a charge of larceny, and to abide the decision of the Court, &c. On the first day of the next term, E. Cooper failed to appear, and his bail when required failed to produce him in Court. On the second day of the term, E. Cooper was again called and failed to appear; and his bail were again required to produce him in Court, but they again made default. The Court then declared the recognizance forfeited, and awarded a scire facias against the principal and bail, requiring them to show cause why the state should not have execution against them on the recognizance. At the next term, the defendants pleaded to the scire facias, that there was no charge of larceny in said Court against E. Cooper, by presentment or indictment, for the said E. Cooper to appear and answer unto; and that, since the said supposed recognizance was entered into, two grand juries had been impaneled and sworn in said Court and charged to inquire, &c., and that no bill of indictment or presentment had been found against said E. Cooper; and that no legal charge of larceny could be found on the records of said Court against him. The attorney for the state demurred, and the Circuit Court adjudged the plea to be good, and gave judgment for the defendants.

Agreeably to a suggestion in the case of *Adair v. The State*, 1 Blackf. 200, this recognizance was forfeited on the first day of the term mentioned in the recognizance, by the default made on that day, and a judgment of forfeiture might have then been entered. 1 Chitt. C. L. 105; 2 Com. Dig. 45. Yet if E. Cooper had appeared at any subsequent day of the term, and no indictment or presentment had been found against him, and no legal reason given why he should be longer held to answer to the charge, the Court might have discharged him and his bail from their recognizance. But the simple fact that no indictment or presentment had been found against him would not, *per se*, be a sufficient ground on which they could claim a discharge, as there might be cases that

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would require the principal still to be held to answer to the charge, although no bill was then found against [*228] him. The passing of another term of *the Court, and the holding of another inquest by the grand jury, who found no bill against E. Cooper, do not alter the case; because if the judgment of forfeiture was legally entered, and the state then had a right to have execution on the recognizance, that right could not be affected by a failure to make out a charge at the succeeding term. In strictness of law, the recognizance was forfeited, and the state had a right to her execution on it, when the first default was made. Subsequent indulgence is discretionary, and can not be claimed by the defendants as a matter of right; and surely the lapse of time necessary for enforcing the right of the state agreeably to the forms of law, can not affect the right itself. We therefore consider the plea as no bar to the action.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Whitcomb, for the state.

Hester, for the defendants.

JACKSON, on the Demise of TAYLOR, *v.* CULLUM.

EVIDENCE—SECONDARY—It is a general rule, that the best evidence must be given of which the nature of the case is capable.

SAME—JUDGMENT.—If any instrument of writing, or even the record of a judgment, be lost or destroyed, the contents may be proved by parol evidence (a).

ERROR to the Dearborn Circuit Court. Ejectment. Plea, not guilty. Verdict and judgment for the defendant.

SCOTT, J.—On the trial of this cause in the Circuit

Jackson, on the Demise of Taylor, v. Cullum.

Court, after the plaintiff had proved a legal title in himself, the defendant offered parol evidence of an outstanding title, founded on a judgment, an execution, a levy, sale, sheriff's deed, and a return of execution, all destroyed by fire. This evidence was objected to by the plaintiff; but the objection was overruled, and the evidence was permitted to go to the jury; and this is the only error complained of.

On the subject of evidence, the general rule is that the best attainable evidence shall be adduced to prove every disputed fact. The effect of this rule is, that, when, from the nature of the transaction, superior evidence [*229] may be presumed to be *within the power of the party, that which is inferior will be excluded. But when it is manifest that evidence of a higher degree is not within the power of the party, that of a lower degree will be received; and the general rule never excludes the best evidence which can be procured. 1 Stark Ev. 391. In conformity with this rule, it has been held, that if a recovery in ancient demesne be lost, and the roll can not be found, parol evidence may be resorted to. 1 Stark. Ev. 159. In the case of *Hilts v. Colvin*, 14 Johns. R. 182, parol proof of a matter of record was excluded, on the ground that there was better evidence then within the power of the party. The case of *Jackson v. Frier*, 16 Johns. R. 193, was decided on the ground that due diligence had not been used in searching for the deed alleged to be lost. In both these cases it is stated that, on proof being made that better evidence was unattainable, parol testimony would have been admitted. In the case of *Hamilton's lessee v. Swearingen*, Add. R. 48, parol evidence was offered to supply the place of a lost deed, but the Court refused to receive it. It is there said, that in some cases such testimony must be received from necessity; but it is of so dangerous a nature that necessity alone can justify its admission. The evidence in that case was offered by the plaintiff, who might have taken

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steps, before he commenced his suit, to restore his title. The situation of a defendant is not so favorable. It might not be in his power, after suit brought and before the trial, to have the title restored on which he rested his defence; and were this even practicable, such a proceeding might be dependent on the will of some other person, under whose title he found it necessary to protect himself. Without resting, however, on the distinction between the situation of a plaintiff and a defendant, we think the case of *Hamilton's lessee v. Swearingen* more than balanced by the doctrine clearly laid down in other cases, where the principles are founded on better reason and tend more to the furtherance of justice.

In the case under consideration no doubt is suggested, and it is believed none exists, of the loss of the papers proposed to be supplied by oral proof; and if there can be any case in which parol evidence would be admitted to supply the loss of a deed or record, we can not easily conceive of one in which necessity would more [*230] strongly urge such a measure. We are therefore *of opinion that the Circuit Court was correct in suffering the defendant's evidence to go to the jury.

Per Curiam.—The judgment is affirmed with costs.

Caswell and Starr, for the plaintiff.

Dunn and Lane and Stevens, for the defendant.

DICKERSON v. GRAY in Error.

BASTARDY—PARTY PLAINTIFF—JUDGMENT (a).

THE prosecution, under the statute for the support of illegitimate children, should be in the name of the state (1).

In all cases in which the state takes an obligation from an individual for the performance of any duty, it should be by recognizance, unless the law otherwise direct.

(a) 1 Ind. 53; 3 Id. 564.

Brown v. Wyncoop.

The order of the Court, in a case of bastardy, after stating what sum the father must pay for the maintenance of the child should be—that the defendant pay the money to the person who shall maintain the child, or become entitled to the same by law; and that he enter into a recognizance with one or more sureties, for the performance of the order.

(1) *State v. Bradley*, Vol. 1 of these Rep. 83; *Woodkirk v. Williams*, id. 110.

BROWN v. WYNCOOP.

FORMER ADJUDICATION—EJECTMENT.—If a defendant in ejectment have a legal title to the premises, and neglect to produce it in that action, he can not, after a verdict against him, obtain an injunction of the proceedings at law, by a bill in chancery founded on the same title.

EJECTMENT—FRAUDULENT CONVEYANCE.—The question, whether a deed be fraudulent and void as to creditors, may be examined and decided in an action of ejectment (b).

FORMER ADJUDICATION—PARTIES.—A decree in chancery is not binding on a person who was not a party to the suit (c).

ERROR to the Franklin Circuit Court.

BLACKFORD, J.—The plaintiff in error was the complainant below. He states in his bill that, in 1825, he bought a tract of land from Rossell Sturdevant, received a title-bond for it at the time, and afterwards, in 1827, obtained from him a deed; that Rossell Sturdevant had bought the land, bona fide, from Azor Sturdevant, in 1817, who, in the same year, had bought it from John Bates.

He further states that, in 1819, Schoonover, the [*231] *assignee of Bates, recovered a judgment against

Azor Sturdevant for 733 dollars and 33 cents, due for the consideration of the land as the complainant believes; that the land was levied on as Azor Sturdevant's, under an execution on this judgment, and bought at the sheriff's sale by Schoonover; that in the same year, 1819.

(b) 35 Ind. 44; 45 *Id.* 589. (c) 27 Ind. 73.

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Schoonover sold the land to Wyncoop, the present defendant; that after the sheriff's sale, Azor Sturdevant paid the judgment to Schoonover, who agreed to enter satisfaction on it; that the complainant, under his purchase, has kept peaceable possession of the premises; that the defendant, claiming under Schoonover, filed a bill in chancery against Rossell Sturdevant, in his absence, alleging that the deed to him from Azor Sturdevant had been made to defraud Schoonover out of his money; that the defendant, though he knew of the complainant's claim, did not make him a party to the chancery suit; that the bill was taken for confessed, in Rossell Sturdevant's absence, and the conveyance to him from Azor Sturdevant was set aside; that after this decree, the present defendant, Wyncoop, brought an action of ejectment against the complainant, and obtained a verdict against him; and, in consequence of the said decree, will recover the possession, unless the Court interferes. The bill prays, that the complainant may be made a party to the former chancery suit against Rossell Sturdevant; that the decree may be opened, and the complainant allowed to answer the bill. It also prays an injunction of the proceedings at law. The defendant demurred to the bill; and the Circuit Court sustained the demurrer.

We have no doubt, but that the decision of the Circuit Court is correct. One short reason is, that the complainant had every opportunity, in the action of ejectment, to defend the cause on the ground of his deed from Rossell Sturdevant. The burthen of proof of that deed's being insufficient, for want of a title in Rossell Sturdevant, lay upon the plaintiff in that action. The decree in chancery against Rossell Sturdevant, was no evidence in the ejectment against the present complainant, because he was not a party to that suit; and, consequently, not bound by the decree in it. By the present bill, the complainant only seeks for an opportunity to oppose the

Smith, Administrator, v. Smith and Others.

charge of fraud, made to the deed by which his grantor claimed the property. The opportunity to do [*232] that was given to the complainant in the *action at law. The demurrer to the bill was correctly sustained.

Per Curiam.—The decree is affirmed with costs.

Rariden, for the plaintiff.

Caswell, for the defendant.

SMITH, Administrator v. SMITH and Others.

PRACTICE—DISMISSAL.—A complainant in chancery may, on payment of costs, dismiss his bill at any time before a final hearing, provided he be not in contempt (a).

CONTEMPT.—The complainant's mere failure to comply with an interlocutory order of the Court, does not of itself so place him in contempt, as to prevent him from dismissing his bill on payment of costs.

ERROR to the Ripley Circuit Court.

HOLMAN, J.—The complainant, as administrator of Samuel Smith, deceased, filed his bill in chancery, in the Ripley Circuit Court, for relief against a settlement of his accounts as administrator, in the Probate Court. The bill admitted the sum of 476 dollars and 36 cents to be due to the heirs of the deceased. The answer claimed more than was adjudged to be due by the Probate Court; and called upon the complainant to answer interrogatories, &c. The Circuit Court made an order that the complainant should, on a certain day, pay into the hands of the clerk of that Court the amount admitted by the bill to be due. With this order the complainant failed to comply. He also failed to answer the interrogatories of the defendants, and they were taken as confessed. The complainant then moved for leave to dismiss his bill;

(a) 2 Ind. 90.

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which leave the Circuit Court refused, because the complainant was in contempt for not obeying the aforesaid order of the Court, and proceeded to enter up a final decree against him.

It is a general rule that a complainant may, upon payment of costs, dismiss his bill at any stage of the proceedings before a final hearing. 1 Newl. Ch. Pr. 177. Agreeably to *Carrington v. Holly*, Dick. 280, although a cause is brought to a hearing and an issue directed, until that issue is tried and there has been a determination, let the cause be in what stage it may, the complainant [*233] may, upon motion, dismiss his bill upon *payment of costs. There is, however, another rule of chancery practice equally general, viz., that when a party is in contempt, he can not be heard until he clears his contempt. But we do not consider that the complainant's non-compliance with the order of the Circuit Court did of itself fix him in contempt, in the technical sense of that term. It was certainly a ground on which the Court might have adjudged him to be in contempt, if no explanation was offered by him; but standing as it does in this case, without any adjudication upon it, it can not be considered as such a contempt as precludes him from being heard in the case. And if he had a right to be heard at all, he had a right to dismiss his bill on payment of costs. The Court, however, had a right to require the costs to be paid or secured before the leave was given.

Per Curiam.—The decree is reversed. Cause remanded, &c.

Stevens, for the plaintiff.

Dunn, for the defendants.

DOE, on the Demise of HELM, v. NEWLAND and Another.

EVIDENCE—DECLARATIONS OF GRANTOR—NOTE—DATE OF DEBT.—A. obtained judgment against B. on a note, and purchased, at the sheriff's sale under the judgment, a tract of land which B., after the date of the note and

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before the judgment, had conveyed to C. A. brought an action of ejectment for the land against C., and the question was, whether B.'s deed to C. was fraudulent and void as to A.

Held, that evidence of B.'s having stated, that the consideration of the deed to C. was a valuable one, was not admissible. *Held*, also, that the note on which the judgment was rendered, was admissible to show the existence of the debt before the date of the deed.

ERROR to the Union Circuit Court.—Ejectment. Plea, not guilty. Verdict and judgment for the defendants.

BLACKFORD, J.—This was an action of ejectment. On the trial of the cause, after the plaintiff had closed his testimony, the defendants introduced a deed of conveyance executed to them by their father, Harrod Newland, dated the 20th of February, 1826, for the premises in dispute. They offered a witness to prove that the vendor had stated, in the defendant's presence, at the time [*234] the deed was executed, that it had *been given upon a good and valuable consideration. This evidence was objected to, but was admitted by the Court. After this and some other similar testimony had been given by the defendants, the plaintiff, in order to show the deed to be fraudulent as to his lessor, offered to introduce, among other evidence, a promissory note, duly executed to him for 120 dollars, given by Harrod Newland, the grantor, and dated the 22d of October, 1822, which was long before the date of his deed to the defendants. The Court rejected this evidence on the ground "that it was the same note upon which the suit was brought, upon which the sheriff's sale took place, under which the plaintiff claimed title; and that the note was merged in the suit."

We have no doubt in this case. The question on the trial was, whether the deed to the defendants by their father was fraudulent and void as to the plaintiff's lessor, in consequence of the grantor's being indebted to him at the date of the deed? To determine this question, it was important to ascertain what had been the consideration

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of the deed. The declarations of the grantor, however, proved by the defendants, that the consideration was a valuable one, should not have been admitted by the Court. The grantor himself, if not interested, would have been a good witness to prove the consideration and support the deed; but his previous declarations on the subject were mere hearsay evidence. On the other hand, if the grantor was interested, the defendants could not introduce him, much less his previous declarations, to support the conveyance he had made to them. With respect to the other point, we are of opinion that the plaintiff, in attempting to prove the deed to be fraudulent as to his lessor, had a right to prove that the note to him by the grantor, which was offered in evidence, was in existence at the date of the deed. The judgment and sheriff's sale, mentioned by the Court below, could not possibly be any objection to the proof of the note, under the circumstances of the case.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Smith, for the plaintiff.

Dunn, for the defendants.

[*235] *GAMBLE and Others v. CUMMINS, in Error.

JUDGMENT—ASSIGNMENT—TO WHOM PAID.

A JUDGMENT, after being replevied by the execution of a replevin-bond, was assigned. *Held*, that payment by the debtor or his replevin-sureties to the original judgment-creditor, before notice of the assignment, was valid.

ALCORN v. HARMONSON.

CONTRACT—LEASE—BREACH—REMEDY.—A person entered into possession of real estate under a parol contract, by which the lessee was to have a written lease for the premises for 7 years, and was to make certain improvements thereon. After a part of the work had been done, and long

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before the expiration of the term, the lessor refused to execute the lease, and obliged the lessee to quit the premises. *Held*, that the lessor, having rescinded the special contract, was liable to the lessee, in indebitatus assumpsit, for the work performed (a).

ERROR to the Marion Circuit Court.

SCOTT, J.—Action on the case on promises, before a justice of the peace. Judgment for defendant. Appeal to the Circuit Court. Verdict and judgment in the Circuit Court in favor of Harmonson, the appellant, for 48 dollars and 50 cents. Writ of error.

A bill of exceptions, made part of the record, states that Alcorn agreed, by parol, to give Harmonson a lease for seven years of an unimproved tract of land. Harmonson was to clear twenty acres, build a cabin, dig a well, and do some other work, and was to have a lease in writing. In pursuance of this agreement, Harmonson went on the land, cleared about nine acres, built a cabin, dug a well, and performed certain other labor, and continued on the premises about two years. Alcorn refused to execute a lease, and gave Harmonson notice to quit the premises, which he did accordingly, and brought this suit to recover a compensation for his labor. It is alleged here, as error, that the contract, being by parol, was void under the statute of frauds, and that the plaintiff could not recover on a general count in assumpsit, on proof of a special agreement.

[*236] *This agreement, being by parol, was not available under our statute, as a lease for seven years; it could have no greater force or effect than a lease at will. The lessor had the power to determine the interest of the lessee; which he did by giving him notice to leave the premises; and, by this act, he rescinded the contract for a seven years' lease. Where money has been paid, upon a contract which is afterwards rescinded by the act of the defendant, it has been held that the plaintiff has a right to recover back the money. 2 Stark. Ev. 116; 1

(a) 1 Ind. 267; 13 *Id.* 494; 20 *Id.* 198.

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T. R. 133; 7 T. R. 177. And no reason exists why the value of labor, performed upon such a contract, should not be recovered on the same principle. Although the parol contract was not binding as a lease for a term of years, it might be used to show that Harmonson was not on the premises as a trespasser, but that the labor was done with the consent and at the request of the defendant; and he having rescinded the agreement by which the plaintiff was induced to perform the labor, left no special contract in existence which could bar the plaintiff's right to recover the value of the improvements in this form of action.

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

Gregg, for the plaintiff.

Fletcher and Brown, for the defendant.

KELSEY v. DICKSON, in Error.

KELSEY and Dickson being partners in a mill which they had built, entered into a written agreement stating, *inter alia*, that Dickson had bought Kelsey's interest in the mill for 500 dollars, to be paid in certain installments. Kelsey, in an action against Dickson for the purchase-money, was permitted to show by parol evidence, that the sum of 500 dollars, which Dickson was to pay Kelsey for his interest in the mill, was exclusive of the expenses that had been incurred in building it; and that those expenses were to be paid by Dickson.

Dickson had given to Kelsey a receipt as follows:

"Rec'd, 17th Oct. 1821, of J. Kelsey, 250 dollars, [*237] which, with 100 dollars, *formerly rec'd (as per rec't given Mr. K.), I am to lay out for him in Louisville, in such goods as will suit the Terre Haute market, charging him cost and carriage; or should this mode

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of settlement not be desired, I am to pay the amount in specie, adding a premium of two *per cent.*—say in all 357 dollars, with interest from the date until paid.—Francis Dickson, Jun.” In an action by Kelsey against Dickson, in which Kelsey claimed the whole amount named in this receipt, it was *held* that, though the original receipt for 100 dollars was not produced nor its absence accounted for, that circumstance was not of itself sufficient to exclude Kelsey from the benefit of the receipt for the whole amount, including the 100 dollars acknowledged to have been previously received.

EVANS and Others v. SHOEMAKER.

JUSTICE OF PEACE—JURISDICTION—AMOUNT.—A justice of the peace, under the statute of 1827, has jurisdiction in actions of debt on penal bonds, conditioned for the performance of covenants, when the penalty does not exceed 100 dollars (*a*).

SAME—PLEADING.—No statement of the demand, except the filing of the bond, is in such case necessary; nor need there be any suggestion of breaches (*b*).

PLEADING—STRIKING OUT.—If a defence be filed, which is not relevant to the cause, it may be rejected on motion (*c*).

OFFICIAL BOND—DELIVERY—BOND—FORM.—The condition of a delivery-bond showed, that the property was to be delivered to the person to whom the execution was directed, but it did not state his name. *Held*, that the omission of the sheriff's name did not render the bond void, but that the ambiguity thereby occasioned might be explained by extrinsic evidence.

ERROR to the Owen Circuit Court.

BLACKFORD, J.—This case had originated before a justice of the peace. The transcript of the justice's judgment, with the bond on which the suit was founded, was filed in the clerk's office on the 21st of December, 1827. Shoemaker was the plaintiff, and Evans, Harris, and John-

(*a*) Ante 216. (*b*) 4 Blk. 174; 5 *Id.* 339; 6 *Id.* 91, 184; 16 *Ind.* 312.
 (*c*) 15 *Ind.* 280.

son, were the defendants. It was an action of debt on a penal bond in the sum of 94 dollars, payable to the plaintiff, and dated the 1st of November, 1827. The condition of the bond was, "that if the above bound Andrew Evans does, on the 12th instant, deliver to me in the town of Spencer, three head of horses, taken by virtue of an execution to me directed from the clerk of the Owen Circuit Court in favor of Thomas Shoemaker, then,"

[*238] &c. *Previously to the commencement of the trial, the defendants filed the following defence, to wit, that the demand, if collected from them, was not coming to the plaintiff, but to certain heirs; that one of the defendants was the surety of the guardian of those heirs; and that the defendants ought not to be compelled to pay, until the surety was discharged as such, he being doubtful whether his principal would faithfully discharge his duties. The execution, returned with the delivery-bond on which this suit is founded, was endorsed as follows: "Came to hand, 14th Sept., 1827.—Robert M. Wooden, sheriff, O. C. Levied on three head of horses, the property of Andrew Evans. Took delivery-bond with Daniel Harris and Gabriel Johnson security thereto, and the defendants failed to deliver the property on the day of sale; therefore no money made on the within execution, but said bond is returned to the clerk's office. Nov. 12th, 1827.—Robert M. Woodin, sheriff, O. C." The justice, after hearing the evidence, gave judgment in favor of the plaintiff for 53 dollars and 54 cents, together with costs. The defendants appealed to the Circuit Court.

In the Circuit Court, a motion was made to dismiss the cause, because, 1st, there had been no statement of the cause of action filed before the justice; and 2d, the justice had no jurisdiction of the cause. This motion the Circuit Court overruled. The plaintiff moved to reject the defence filed before the justice; which motion the Court sustained. The plaintiff suggested, on the record, the following breach of the condition of the bond, to wit,

"that the said Andrew Evans did not, nor did any other person, deliver the said three head of horses, or either of them, on the said 12th of November, 1827, in the town of Spencer aforesaid, in manner and form as they were bound in said condition to do." The cause was submitted to the Circuit Court without a jury. A judgment was rendered in favor of the plaintiff below for 94 dollars, the penalty of the bond; and the damages were assessed at 54 dollars and 90 cents, together with costs.

The first error assigned is, that the justice had no jurisdiction of the cause, because the bond on which the suit was founded was a penal one, conditioned for the delivery of property taken by the sheriff on execution. In answer to this, it must be observed that the statute [*239] of 1827 gives the justice jurisdiction in *all actions of debt, where the sum due or demanded does not exceed 100 dollars, exclusive of interest and costs. The present case, certainly, comes within the terms of the statute (1). The second error assigned is, that no statement of the cause of action was filed before the justice. There is nothing in that. The statute of 1827 requires no statement of the demand in such a case, except the filing of the bond, which was done. The third assignment or error is, that the Circuit Court should not have rejected the defence, nor have permitted the suggestion of breaches. The defence was properly rejected. That one of the defendants was a surety of the guardian of certain heirs entitled to the money after the collection of it by the plaintiff, had nothing to do with the case. The suggestion of the breach was mere surplusage, in a case originating before a justice. No assignment of breaches was necessary. The last error assigned is, that the bond is void. It is objected under this head, that the condition of the bond does not state to whom the property was to be delivered. The answer to this is, that although the name of the sheriff is not mentioned, yet as delivery was to be to the person to whom the execution was directed by the

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clerk of the Court, the omission of the name of the sheriff, only created such an ambiguity as was susceptible of explanation by extrinsic proof. The return on the execution shows that the bond was taken by Robert M. Wooden, the sheriff of the county. There may have been other explanatory testimony; and as the evidence is not spread on the record, we must presume that the necessary proof was given. There appears to us therefore, to be no ground for the objections, made by the plaintiffs in error to the proceedings in this cause. The judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

Hester and Gregg, for the plaintiffs.

Whitecomb, for the defendant.

(1) Vide *Washburn v. Payne*, ante, p. 216, and note.

[*240] *LEFAVOUR and Another v. YANDES and Another.

PARTNERSHIP—DECLARATIONS OF PARTNER.—Assumpsit by partners for work and labor. *Held*, that evidence of the statements of one of the partners, made after the dissolution of the partnership, so far as they tended to show a new contract destroying the partnership claim, and giving to each partner a separate demand for his part of the debt, was not admissible; but that the statements of such partner, so far as they showed a payment made to himself, might be proved (*a*).

APPEAL from the Marion Circuit Court.—Assumpsit. Plea, the general issue. Verdict and judgment for the defendants.

SCOTT, J.—An action was brought in the name of Lefavour and Shryock against Yandes and Wilson, for work and labor in erecting a mill. The defendants introduced evidence to prove that Shryock, one of the plaintiffs, disclaimed the action, and acknowledged that he had received satisfaction in full for his part of the labor, and that an agreement had been made, by and between the plain-

(a) Post 371; 3 Blkf. 433; 2 Ind. 322; 6 *Id.* 304; 12 *Id.* 223.

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tiffs and the defendants, subsequently to the completion of the work, that the defendants were to pay each of the partners his part severally. On this evidence the Court instructed the jury, "that if there was an acknowledgment by one of the partners, after the dissolution of the partnership, that an agreement was made by the parties, subsequently to the completion of the work, that the defendants were to arrange, satisfy, and pay each of the plaintiffs, as they could agree with each of them severally; and that they did accordingly pay one of the partners in full for his part; the other partner must bring a separate suit for his part." To this instruction the plaintiffs excepted, and their bill of exceptions is spread on the record.

Had the defendants proved such an agreement by a disinterested witness, or other legal proof, they might have defeated an action in the partnership name; but the objection here is to the kind of proof which is introduced to establish the agreement. Had Lefavour brought his action separately for his part of the claim, proof of Shryock's acknowledgment would have been insufficient to show the separation of interests; and the reason is equally strong, that it should have been received to defeat

an action in the partnership name. On this ground,
[*241] *we think the judgment for the defendants in the

Circuit Court is erroneous. Several other exceptions were taken in the course of the trial below, which need not now be noticed. From a view of the whole case, we are of opinion that the action in the name of the partners should be sustained. Shryock's admissions are admissible to prove the payment made to himself but not to change the contract (1).

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Brown, for the appellants.

Fletcher and *Gregg*, for the appellees.

(1) The declarations of one partner, as to the payment subsequently to a dissolution of a debt due to the partnership, are admissible against the other partner. *Russell & Mylne*, 191, per BROUGHAM, Chancellor.

Wilson v. Harding.

WILSON v. HARDING.

EVIDENCE—HEARSAY.—Neither hearsay nor irrelevant testimony is admissible.

SLANDER—PERJURY.—A declaration in slander charged the defendant with having said, that the plaintiff had sworn false on a certain trial before a justice of the peace; but there was no averment that the testimony alleged to be false, was material. *Held*, that the declaration could not be objected to, after verdict, for the want of that averment (a).

ERROR to the Marion Circuit Court.—Slander for words charging the plaintiff with having sworn false, on a certain trial, before a justice of the peace. Plea, not guilty.

SCOTT, J.—An action of slander was brought in the Marion Circuit Court, by Harding against Wilson for words importing a charge of perjury on a trial before a justice of the peace. There was a verdict and judgment for the plaintiff in the Circuit Court; and to reverse that judgment is the object of this writ of error.

One error assigned is that Wilson, the defendant below, asked Sharpe, one of the witnesses, what one Wright had said on the subject of Harding's testimony before the justice. To which question Harding objected; and the Court sustained the objection. Another error assigned is, that the Circuit Court admitted, as evidence, a transcript of the proceedings before justice Bradley, in [*242] the case to which reference was had in the *charge of perjury. A third error assigned is, that the defendant below offered to prove certain admissions, and subsequent denials, made by the plaintiff in a conversation with himself. We think there is nothing in these objections. Had the question, stated in the first assignment to have been asked by the defendant, been answered by the witness, it would have been hearsay evidence. It was therefore properly rejected. We can discover no ground to support the second objection. And the third refers to

(a) 52 Ind. 442; 13 *Id.* 535; 50 *Id.* 129.

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testimony which was irrelevant, and therefore inadmissible. All the other errors assigned converge to one point. It is alleged that the words are not actionable, because it is not stated in the declaration that the testimony given by Harding on the trial alluded to, was material to the point in issue. This position, we think, is not supported by either principle or precedent. Where there has been a trial before a competent tribunal, it will be presumed that the testimony given on that trial was material. To charge a man with perjury, in reference to a trial where perjury might be committed, is actionable; as to say, you were foresworn at such a trial; or, as in this case, to say of another, that he is foresworn before a justice of the peace, has been held to be actionable. Stark. on Sl. 78; 3 Lev. 166. Slanderous words should be taken, in Courts of justice, in the sense in which they are commonly understood. Every slander imports an injury; and the injury arises from the words in their common acceptation. The words, in this case, without explanation or qualification, have a slanderous import; the jury have so understood them; and it is not the duty of the Court to search for possible cases, in which they might have been spoken in a sense more innocent than that which has been ascribed to them. The judgment of the Circuit Court must be affirmed.

Per Curiam.—The judgment is affirmed, with 1 *per cent.* damages and costs.

Brown and Merrill, for the plaintiff.

Wick, Fletcher, and Gregg, for the defendant.

[*243]

YOUSE v. M'CREARY.

MORTGAGE—DEFAULT—REMEDY.—If a person, holding a bond for the payment of money secured by a mortgage on real estate, proceed first upon the mortgage, he is precluded by the statute of 1824 from any other rem-

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edy. But he may proceed first upon the bond to judgment, sell the mortgaged property on execution, and hold the obligor liable for any balance that may remain due: in this case, the obligee waives his claim under the mortgage, and the purchaser at sheriff's sale holds the land freed from the mortgage (a).

NOTE—INSOLVENT MAKER—REMEDY OF ASSIGNEE.—If the maker of a note be notoriously insolvent, the assignee may sue the assignor without having previously sued the maker (b).

SAME—SAME—DAMAGE.—If the assignee of a note can not collect the money from the maker, he may recover from the assignor the amount paid for the assignment, together with interest and the costs of the suit against the maker. The amount of the note is *prima facie* evidence of the price received by the assignor; but he is at liberty to prove the real consideration (c).

ERROR to the Union Circuit Court.

BLACKFORD, J.—This was an action of assumpsit by M'Creary, the assignee of a sealed note, against Youse, the assignor. The declaration states that the note was made on the 25th December, 1824, by Chesney to Kelly, for 66 dollars and 66 cents, and assigned by the payee to Youse, who assigned it to M'Creary. It is also averred, that, at the time the note became due, the maker was insolvent, and has so continued ever since. The defendant pleaded the general issue. The following is the agreed case:

“The parties in the above entitled cause agree that the following are the true facts upon which this cause is founded, to wit, the writing obligatory upon the assignment of which this suit is founded—together with two other notes, each of the same amount, one of which has since been paid by the maker, and the other of which has been prosecuted against him, and a part of the amount made by a sale of his property, and a judgment rendered for the balance against the defendant in this cause—was executed by Chesney, at the time stated in the declaration, to the payee, in consideration of a house and lot in Brownsville. Chesney at the same time executed to the

(a) Post 268. (b) 4 Ind. 318; 9 Id. 522; 11 Id. 245. (c) 37 Ind. 107.

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payee of the notes a mortgage on the same house and lot, and duly acknowledged the same, for the amount of the notes, as a collateral security for their payment; [*244] and the *mortgage was recorded in proper time.

Two of the notes, one of which is the foundation of this suit, were assigned to the defendant, as stated in the declaration, by the payee thereof; and, at the same time, the mortgage was, by the mortgagee, assigned to the defendant as a collateral security for the payment of these two notes. The defendant, Youse, assigned the said two notes to the plaintiff by a general assignment; and, at the same time, assigned the mortgage to him as a collateral security; in consideration of a wagon, worth about 65 dollars, sold and delivered by the plaintiff to the defendant. At the time the note specified in the declaration became due, Chesney, the maker, had not, nor has he yet, any property whatever, and was and is totally insolvent, except as to the said house and lot mortgaged as aforesaid; which house and lot, it is agreed, had, previously to the time the said note, upon the assignment of which this suit is founded, became due, been levied upon, taken in execution, and sold, by the said plaintiff, on a judgment obtained by him, in the Union Circuit Court, on one of the notes mentioned in the mortgage; and the same only sold for the sum of 20 dollars and 25 cents, 10 dollars and 25 cents of which were applied to the costs of the suit, and the balance applied to that judgment, the residue of which judgment still remains unpaid. The plaintiff has not proceeded on the mortgage, but still holds the same, not discharged, unless the sale of the mortgaged premises by his order, on the judgment aforesaid, should be considered a discharge. The plaintiff has a judgment unsatisfied against the defendant, Youse, in the Union Circuit Court, for 50 dollars and 6 cents, the balance due on one of the notes assigned as a consideration for said wagon, and has received satisfaction of Chesney, the maker, for the sum of 7 dollars and 50 cents of the

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amount of said note on which said judgment was rendered, by the sale of the mortgaged premises.

"The defendant contends, that if the plaintiff is entitled to recover, the measure of damages in this case should be the consideration given for the assignment of the notes, with interest, to wit, 65 dollars, deducting the sum of 57 dollars and 6 cents, a part of which was heretofore made, and for the balance of which judgment has already been rendered on the other note. The plaintiff con-

tends, that he is entitled to recover the face of the [*245] note, with interest, regardless of the value *given for the assignment, as the assignment is general, and no special contract relative to the matter.

"Now if the plaintiff is entitled to recover, under this statement of facts, then the Court will render judgment for him, and assess his damages. But if the Court should be of a different opinion, then a judgment is to be rendered for the defendant.

"*O. H. Smith*, for the pliff.

"*Rariden*, for the deft."

The Circuit Court gave judgment in favor of the plaintiff, for the amount of the note specified in the declaration with interest, to wit, for 68 dollars and 90 cents; together with costs.

The first question in this cause is, whether the plaintiff can recover, under the circumstances of this case? It is contended that, as the assignment of a mortgage accompanied that of the bond, the plaintiff was obliged, by the statute of 1824, to rely upon the mortgaged premises alone for the payment of the debt. We think, however, that he was not. To be sure, if the holder of a bond and mortgage elects to proceed first upon the mortgage, he is precluded, by the express terms of the statute, from any other remedy (1). But there is nothing in the statute, in our opinion, to prevent such a holder from proceeding first upon his bond, selling the mortgaged premises on execution, and thus electing to abandon the mortgage.

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In this case M'Creary, in selling the house and lot on his execution, waived any claim he might have had under the mortgage; and the purchaser at sheriff's sale received the property freed from the mortgage. The consequence is, that, according to the facts agreed on, the complete insolvency of Chesny was established, as alleged in the declaration. In cases of that kind, to wit, of the maker's notorious insolvency, a suit against him, in our opinion, is not necessary in order to bind the endorser. The plaintiff, therefore, in this case, had a right to recover.

The next question for our consideration is, what is the measure of damages in an action, like the present, on the assignment of an obligation? It appears to us, that where the money can not be obtained from the maker of the note, the consideration which moved from the assignor for whatever he receives for the note, thereby fails; [*246] and he should then be liable for the *value which he had received from the assignee for that consideration, with interest, and the costs of the suit against the maker. See 1 Bibb, 545. The amount of the note is *prima facie* evidence that that was the price paid for the assignment; but this ought not, we think, to prevent the assignor from showing that the real value he received was less than the face of the note. The intention of our statute, making the obligations assignable, will be best answered, as we conceive, by this construction. In the present case, the defendant received from the plaintiff a wagon, worth a certain sum, on a consideration which has failed in consequence of Chesny's insolvency; and the defendant would be bound to return the value of the wagon, with interest, had the plaintiff received nothing from the maker in the suit on the other note; and had he not a judgment already against the *defendant himself*, on the assignment of that note. These circumstances, however, must affect the amount of the judgment to be recovered in the present case. The correct rule for the assignment, of the damages, which the plaintiff, M'Creary, may be en-

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titled to recover, if any, we consider to be this: From the agreed value of the wagon, with the interest, must be deducted the amount received by the plaintiff on his judgment against Chesny on the other note, and also the amount of the plaintiff's judgment obtained against the defendant on the assignment of that note, exclusive of costs. We think that the rule adopted by the Circuit Court, in this case, in assessing the damages, to wit, that the face of the note must regulate the amount, is not in accordance with the spirit of our statute making these obligations assignable.

The judgment must be reversed, and the cause remanded for a new assessment of damages.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Rariden, for the plaintiff.

Smith, for the defendant.

(1) The statute of 1824, referred to in the text, is repealed. Vide Stat. 1830, p. 50; R. C. 1831, p. 244.

[*247] *NAYLOR v. MOODY and Another, Executors.

FOREIGN ADMINISTRATION—PRACTICE.—Letters testamentary or of administration, granted in another state, will not authorize the executor or administrator to commence a suit in this state, unless the letters be previously recorded in the Circuit Court of the county in which the suit is commenced (a).

ERROR to the Clark Circuit Court.

SCOTT, J.—Richard Moody and Polly Moody, claiming to be executor and executrix of the last will and testament of John Moody, deceased, filed in the office of the clerk of the Court of Probate of Clark county, certain papers purporting to be letters testamentary, granted to

(a) 35 Ind. 332; See 17 *Id.* 41.

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them by the county Court of Henry county, in the state of Kentucky, accompanied with the last will and testament of the said John Moody, deceased; and, on the same day, sued out a scire facias to revive a judgment of the Clark Circuit Court, in favor of the said John Moody, deceased, against William H. Moore, and to have execution thereon against the said William H. Moore and Isaac Naylor, his replevin-surety. This scire facias was returned served upon Naylor, and not found as to Moore. Naylor appeared and filed three pleas; one of which was that the letters testamentary, in the said writ mentioned, had never been entered of record in any Circuit Court within this state. To this plea the plaintiffs replied, that the said letters were entered of record as required by law. The matters in issue were submitted to the Court; and there was judgment for the plaintiffs, and execution awarded.

Our statute of January the 26th, 1824, sec. 28, provides that letters testamentary and letters of administration, obtained in a sister state, shall have full force and effect within this state, and that the executors and administrators mentioned therein may sustain suits thereon, and do all other acts thereby authorized, upon having the same entered of record in any Circuit Court in this state. The letters testamentary, in this case, were filed in the clerk's office in vacation. It is not alleged that they were recorded; but it is contended that the requisition of the statute is answered by the filing of the papers in the clerk's office. We think the statute requires

[*248] something *more. Filing and entering of record are not synonymous: they are no where so used.

These phrases frequently occur in our statutes; and they always convey distinct ideas. Filing, originally, signified placing papers in order on a thread or wire, for safe keeping. In this country, and at this day, it means, agreeably to our practice, depositing them in due order in the proper office. Entering of record uniformly means writing. It appears clearly, by the manner in which the words are

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used in our statutes, that the legislature has recognized this distinction. If this view of the case be correct, the plaintiffs below, at the time they sued out the scire facias, had not taken the steps necessary to authorize them to sustain a suit in their representative capacity. They should, instead of filing their papers in the probate office, have had them recorded with the proceedings of the Circuit Court, subject to the inspection and control of that Court, in case of any alleged defect or insufficiency. Whether the plaintiffs had, or had not, entitled themselves to sue as executors was a point directly before the Court on the issue; and the judgment should have been for the defendant (1).

Per Curiam.—The judgment is reversed with costs.

Dewey and Naylor, for the plaintiff.

Farnham, for the defendants.

(1) If a foreign executor wish to recover by suit, in *England*, a debt due to his testator, a personal representative must be constituted, by the spiritual Court in *England*, to administer *ad litem*. *Attorney General v. Cockerell*, 1 Price, 179.

An executor or administrator can not, by virtue of letters testamentary or of administration granted in one state maintain an action in any other state. *Fenwick v. Sear's Adm'rs*, 1 Cranch. 259; *Dixon's Ex'rs v. Ramsay's Ex'rs*, 3 id. 319; *Morrell v. Dickey*, 1 Johns. Ch. R. 153.

"Letters testamentary, of administration, or of guardianship, granted in any of the states or territories of the United States or in any foreign country, shall authorize the executor or administrator thereby appointed, to sustain actions and suits, and to do all acts coming within their powers as such, within this state, upon the same or copies thereof duly and legally authenticated, being produced and filed with the clerk of the Court in which such suits or actions are to be maintained, or within the jurisdiction whereof such acts are to be done. And such guardians, after having filed a copy of their appointment, and given bond and security under the provisions of this act, shall have all the privileges of resident guardians." R. C. 1831, p. 170.

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JUDGMENT—COSTS.—If the jury find a defendant in an indictment guilty and assess the fine, but acquit him as to costs, no judgment for costs can be rendered against him.

STATUTES—CONSTRUCTION.—Statutes enacted at the same session of the leg-

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islature are to be taken *in pari materia*, and should receive a construction which will give effect to each if possible. But if each of them can not have the same entire effect when taken in connection with the others, that it would have if taken singly, they must be so construed as to give effect to what appears to have been the main intention of the legislature (a).

ERROR to the Decatur Circuit Court.

HOLMAN, J.—Rackley was indicted for retailing spirituous liquors without license. The jury found him guilty and assessed his fine at three dollars and sixty-six cents, and acquitted him of costs. The prosecuting attorney moved the Circuit Court for a judgment for costs *non obstante veredicto*; which motion being overruled, and judgment given on the verdict for the fine only, he filed a bill of exceptions, and has brought the subject before this Court on a writ of error.

The 72nd section of the act respecting crimes and punishments, approved January the 20th, 1824, is in these words: "Costs of suit shall, in all cases of conviction, be included in the judgment, where the jury do not find otherwise." R. C. 1824, p. 150 (1). It is not contended but that this provision, taken by itself, confers on the jury a right, in cases of conviction, to acquit the defendant of costs. But it is urged that this power in the jury is virtually taken away by the act regulating the fees of officers, which was passed at the same session of the legislature, and approved the 30th of January, 1824. By which statute it is enacted, that the officers therein mentioned shall be entitled to receive for their services the fees, thereby allowed. Then follows a list of services and fees, including the fees of clerks, sheriffs, &c., in criminal cases, in which it is stated that the prosecuting attorney's fee for every conviction upon indictment or presentment shall be five dollars. The fees in criminal cases allowed by this act, are the costs for which judgments are usually given, and what the act, in ordinary acceptation, presupposes that the person convicted shall pay. This is

(a) 6 Ind. 354.

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the plain meaning of the act. But this meaning [*250] is not *expressed in such positive terms, as to authorize this Court in saying that the act would admit of no other, if we should thereby render ineffective a previous enactment of the same legislature. This act gives the officers a right to the enumerated fees, but does not say in express words that they shall be paid by the defendant in all cases of conviction; and the legislature having previously authorized the jury to acquit the defendant of costs, we can not say that the two acts are so contradictory that they can not stand together; although by this construction, we find the officers of the Court entitled to certain fees in criminal cases, without any legal method of obtaining them, whenever the jury think proper to discharge the defendant from the payment of costs.

There is another act on the subject of the fees of the prosecuting attorney, which was also approved on the 30th of January, 1824; which provides that, in all judgments in criminal prosecutions against any defendant or defendants, the sum of five dollars shall be taxed in the bill of costs, in favor of the prosecuting attorney. R. C. 1824, p. 128. This act seems to be more repugnant to the dispensing power of the jury, with respect to costs, than the act regulating fees; yet if this act is not altogether inconsistent with that, we should give it that construction which, in our opinion, will give effect to what might have been the intention of the legislature in their several enactments (2). These acts, being passed at the same session of the legislature, are to be taken *in pari materia*, and to receive a construction that will give effect to each if possible; but as each can not have the same entire effect, when taken in connection with the others, as it would have if taken singly, we must so construe them as to carry into effect what appears to have been the main intention of the legislature. That intention we conceive to be this:—In criminal cases the several officers, includ-

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ing the prosecuting attorney, shall be allowed certain fees, which as a general rule, shall be taxed in the bill of costs against the person convicted, and for which a judgment shall be given; provided, nevertheless, that the jury shall have a right to discharge a person convicted from the payment of costs. We conceive that, by this construction, there is less violence done to the intention of the legislature, than there would be in supposing [*251] that they, by one act, intended to defeat *another that had been enacted at the same session. Under this construction, if the jury exercise their dispensing power, and acquit the defendant of costs, there will be no bill of costs in which the prosecuting attorney's fee can be taxed; and of course it will be left, with the other fees, without any provision for its payment. The Circuit Court acted correctly in refusing to give judgment for costs.

Per Curiam.—The judgment is affirmed.

Whitcomb, for the state.

Wick, for the defendant.

(1) Acc. R. C. 1831, p. 195.

(2) Where two acts are repugnant, that which received the royal assent last must prevail. *Rex v. Inhabitants of Middlesex*, Dowl. P. R. 116.

THE STATE v. ALBERTSON.

GAMING—CRIMINAL PRACTICE.—The winning of any sum of money however small, at a game with cards, is an indictable offence of which the Circuit Court has exclusive jurisdiction.

JUSTICE OF PEACE—CRIMINAL JURISDICTION.—Offences punishable by a fine not exceeding three dollars, belong exclusively to the jurisdiction of justices of the peace. Other offences, punishable by a fine which may be more or less than three dollars according to circumstances, are cognizable only by the Circuit Court.

ERROR to the Marion Circuit Court.

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HOLMAN, J.—Indictment for winning thirty-seven and a half cents at a certain game with cards. Indictment quashed on motion by the Circuit Court. Writ of error by the state.

The only question in the case is, whether the offence is indictable in the Circuit Court, or falls exclusively within the jurisdiction of a justice of the peace.

The 74th sec. of the act respecting crimes and punishments states, that “in all offences in this act contained, to which the affixed penalty does not exceed three dollars, exclusive jurisdiction is given to justices of the peace of the proper county.” R. C. 1824, p. 150 (1). This act contains a number of offences that are punishable by a fine not exceeding three dollars. All these belong exclusively to the jurisdiction of a justice of the peace.

The act specifies many other offences punishable [*252] *by fine, which may be more or less than three dollars, according to the circumstances of the case. These do not come within the foregoing provision of the act. The terms of the act refer to offences by their appropriate names, and not to the degree of criminality in the commission of an offence. If the highest penalty for the commission of the offence, by its statutory name, does not exceed three dollars, the jurisdiction thereof belongs exclusively to a justice of the peace; but if a commission of the offence may be punished by a higher fine than three dollars, it does not come within the aforesaid provision, but belongs exclusively to the general jurisdiction of the Circuit Court.

This assignment of jurisdiction is of offences in general terms, and does not depend upon the particular circumstances which may attend the commission of an offence. And we conceive that this should be the rule by which the jurisdiction should be determined, not only where the amount of the penalty is discretionary in the tribunal that adjudicates upon it; but also where the penalty is to be determined by a statutory criterion, accord-

ing to the amount which is the subject-matter of the offence, as is the case in the offences of winning or losing, extortion, &c. In these offences, it has been urged that, when the winning and losing does not exceed one dollar and fifty cents, or the sum extorted does not exceed thirty cents, the fine can not exceed three dollars, and of course that, to this amount, they are assigned exclusively to the jurisdiction of a justice of the peace. But we think that, by a fair construction of the section of the act under consideration, it will be found to embrace those offences only, of which the justice of the peace can take cognizance through all the variations with which they may be committed. And we think that this intention of the legislature is rendered more certain, by the difficulty and uncertainty that would otherwise attend the administration of justice under this part of our criminal code.

It is worthy of notice that the sum, by which the amount of the penalty in these cases is determined, is, of itself, a subject of adjudication, and might be considered greater or smaller, from the same evidence, by one tribunal than by another; so that to fix that sum [*253] as a line of demarkation between two *distinct jurisdictions, would in many instances jeopardize the administration of justice; as, in the offence of winning, the justice of the peace might be of opinion that a greater sum than one dollar and fifty cents was won, which would exclude the case from his jurisdiction; and, in the same case, if afterwards heard in the Circuit Court, the jury might find that the sum won did not exceed one dollar and fifty cents, which would exclude the case from the jurisdiction of the Circuit Court. So that although no doubt existed as to the commission of the offence; yet, on account of the different opinions of different tribunals as to the sum involved in the offence, the offender would go unpunished.

In the case before us, the amount said to have been won, as charged in the indictment, is thirty-seven-and-a-

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half cents; and so leaves no doubt as to the utmost extent of the penalty; and therefore does not exhibit a full view of the difficulty that would grow out of the rule of determining the jurisdiction by the sum lost or won. But if the sum charged in the indictment, when less than one dollar and fifty cents, would exclude the case from the jurisdiction of the Circuit Court, the same sum found in the verdict of the jury, would have the same effect; and as we think it was not the intention of the legislature to introduce this uncertainty as to the jurisdiction of this offence, we can not think they intended to determine the jurisdiction of the offence by the sum lost or won, although in a particular case like the present, no inconvenience would result from the adoption of such a rule.

We are therefore of opinion that the legislature, in assigning jurisdiction to the justices of the peace, had reference to offences by their statutory names, without any regard to the circumstances of the case by which the amount of the penalty is to be determined. So that as soon as it is known that an individual has committed a particular offence, it will be also known what tribunal has cognizance of that offence. But if the jurisdiction depended on the degree of criminality in the commission of the offence, the proper tribunal that had cognizance of the offence, could not be known until something like an adjudication had taken place; and in many cases the full means of determining the jurisdiction could not be obtained until the matter was under judicial investigation; [*254] and a small mistake, *in a sum lost or won, might be fatal to the jurisdiction resorted to.

This division of the offence under consideration, between two distinct jurisdictions, might also place some offenders who were guilty in nearly the same degree, under very different circumstances as it regarded their trial, and the costs to which they might be subjected. The case of one would be assigned to the jurisdiction of a justice of the peace, and the case of the other to the jurisdiction of the

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Circuit Court, because there was a difference of a few cents in the sums they had lost or won. Beside this, by the 77th sec. of the same act, "all criminal prosecutions, where the penalty shall not exceed three dollars, shall be commenced within thirty days next after the offence is committed;" while the general limitation of criminal prosecutions is two years (2); so that a division of this offence between the two jurisdictions, would place the cases of different persons, who might be guilty of this offence, under different acts of limitation; whereby they might be very differently affected when there might be but a shade of difference in their criminality; and this difference in the acts of limitation, if they are both applicable to this offence, dependent on the sum lost or won as to which shall embrace any particular case, would greatly increase the difficulty of convicting persons who might be guilty of this offence. We therefore think that it was the intention of the legislature to give exclusive jurisdiction of this offence to the Circuit Court, and that the indictment in this case should not have been quashed. The case of *The State v. M'Coy* has been referred to as supporting a contrary rule of construction (3). But that case is predicated upon peculiar expressions in the act of assembly regulating the jurisdiction of justices of the peace; which necessarily requires a peculiar construction, and one that should not be extended beyond the express requirements of that act; and more especially as that act has been questioned, as well on the ground of policy as of constitutionality. But although that decision recognizes a discretionary jurisdiction in justices of the peace in cases of assault and battery, yet that jurisdiction is not exclusive, even to the amount of three dollars. The Circuit Court has jurisdiction in all such cases, if they have not been adjudicated on and finally determined by the justice of the peace.

[*255] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

Vattier, Assignee v. Roberts.

Whitcomb, for the state.

Caswell, for the defendant.

(1) Acc. R. C. 1831, p. 195, sec. 77.

(2) Acc. R. C. 1831, p. 195, sec. 83, 84.

(3) Ante, p. 5.

VATTIER, Assignee, v. ROBERTS.

CORPORATION—CONTRACT—LIABILITY OF MEMBERS.—The members of an incorporated company assumed the name of "The Aurora Association for Internal Improvement;" and in that name, by their agent, executed a title-bond for a lot in the town of Aurora. *Held*, that the bond was not obligatory on the members of the company, and was consequently not a valid consideration for a note given for the price of the lot.

ERROR to the Dearborn Circuit Court.

BLACKFORD, J.—Assumpsit on four promissory notes, payable at a future period to Norris, agent to the Aurora association for internal improvement, for the use of said association; which notes were assigned by Norris to Vattier. Pleas, 1st, non-assumpsit; 2d, actio non, because the notes were given in consideration of a supposed legal liability, on the part of the individuals forming the Aurora association, to make the defendant a warranty deed for a lot in Aurora; and the individuals forming the said association were not legally bound to make the deed as aforesaid. There are no replications to the pleas. After the notes had been proved, the defendant gave in evidence the following writing: "This shall oblige the Aurora association for internal improvement, by themselves or their trustees, to make or cause to be made unto Aaron Roberts, or unto his heirs, &c., a deed of conveyance in fee simple with general warranty, for lot numbered 104 in the town of Aurora, provided 51 dollars of the purchase-money therefor are paid in eight months, and the balance in five years from this date, otherwise this obligation to

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be void and of no effect. The deed to be made as soon as the purchase-money therefor is paid, under the penalty of 1,000 dollars. Witness my hand and seal, April [*256] 30th, 1819. *By order of the Aurora association for internal improvement. (Signed) Richard Norris, agent."

The defendant proved by Norris, that this was the only writing given by him, or said association, to the defendant as evidence of the purchase of the lot. The witness, on being questioned by the defendant, said that his appointment as agent was in writing; but that he could not recollect whether the appointment was signed by all the individuals of the association, or only by the president and clerk of the meeting. There was no other testimony of his appointment. The plaintiff called upon the Court to charge the jury, that it rested upon the defendant to show that Norris was not authorized by the association, or by the individuals composing it, to execute the said writing and bind them by the same. Whereupon the Court charged the jury that no authority whatever, given by the said association, by the name of the Aurora association for internal improvement, to the said Norris, could authorize or enable him to bind the association, as, by their said name of the Aurora association for internal improvement, in and by said writing he has attempted to do; or would make the said writing obligatory upon the association. The jury gave a verdict for the defendant; and there was judgment accordingly.

The plaintiff contends that the Court below committed an error in refusing the instructions asked for, and in giving those which were given.

We can discover no error in these proceedings. The circumstances of the Aurora association's being bound to execute a warranty deed to the purchaser, Roberts, for the lot, was the consideration of the notes upon which this action was founded. The instrument of writing given by Norris, did not bind the association, no matter what his

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authority may have been. The company was not a corporation, and the members could not bind themselves by the special denomination of "The Aurora association," to execute a conveyance: *a fortiori*, an agent could not so bind them. The obligation, to have been valid against the association, should have been executed by all the individual members, either personally or by their agent. This was not done, and the notes consequently stand without any valid consideration to support them.

HOLMAN, J. was absent.

[*257] **Per Curiam*.—The judgment is affirmed with costs. To be certified, &c.

Dunn, for the plaintiff.

Caswell, for the defendant.

PEGG and Another v. CAPP, in Error.

SUBPŒNA—RETURN.

THE return to a subpœna in Chancery against Abner M'Carty and John Pegg was as follows: "Executed on Abner M'Carty the 25 March, 1826. John Pegg, not found, 20 March, 1826.—*R. John*, sh'ff." A decree, reciting that it appeared to the satisfaction of the Court that the subpœna had been duly executed, was entered against the defendants *pro confesso*. *Held*, that the return was insufficient to authorize a decree.

THE STATE v. HAILSTOCK, in Error.

ASSAULT WITH INTENT—INDICTMENT.

AN indictment for an assault with intent to commit a felony must show with certainty the particular felony intended to be committed.

Sheets v. Ferguson and Others, in Chancery.

A common assault is not an indictable offence. It is punishable, however, by a justice of the peace (1).

(1) A common assault is, at common law, an indictable offence. 4 Bl. Comm. 216. Here, by statute, justices of the peace have exclusive jurisdiction of offences to which the affixed penalty does not exceed three dollars; and a common assault is an offence of that kind. R. C. 1831, pp. 193, 195. An assault with intent to commit a felony, is an indictable offence, and punishable by imprisonment in the state prison for any term of time not exceeding fourteen nor less than two years, and by fine not exceeding 1,000 dollars. Id. p. 186.

SHEETS v. FERGUSON and Others, in Chancery.

THE opinion in this case is overruled. Vide the order of the Court, on the report of the commissioner, in the case of *Bruner and Others v. Manville and Others*, May term, 1832, post.

[*258] *RAY and Another v. ROE, on the Demise of BROWN.

FRAUDULENT CONVEYANCE—SUBSEQUENT CREDITOR.—The pendency of an action of slander does not, of itself, render the defendant's sale and conveyance of real estate void as to the plaintiff; though a judgment be afterwards recovered against the defendant, and he have no other property to satisfy the debt (a).

SAME—PENDENTE LITE—NOTICE.—The pendency of an action is constructive notice of the matter involved in that suit; and a purchaser of the property which is the immediate object of the pending action will be affected by it, as a purchaser with notice (b).

ERROR to the Union Circuit Court.—Ejectment by Roe, on the demise of Brown, against W. Ray and D. Ray. Plea, not guilty. Verdict and judgment for the plaintiff.

SCOTT, J.—This was an action of ejectment in the Union Circuit Court. We have no information by what kind of title the lands in controversy were claimed by either

(a) 16 Ind. 172; 42 Ia. 375; 35 Id. 170. (b) 35 Id. 170.

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party. The only point referred to our adjudication, is the correctness of the charge given by the Court to the jury. The Court instructed the jury, that a transfer of property, made by a defendant during the pendency of an action of slander against him, and before the rendition of judgment, is of itself fraudulent; unless it be made in performance of a prior contract, or in payment of a precedent *bona fide* debt; that all purchasers are bound to take notice of the pendency of said suit; and that if a purchase be made during the pendency of such action, whether with or without consideration, it is considered fraudulent in law as to the judgment plaintiff; unless there is other property sufficient to satisfy the judgment. To this instruction the defendants except.

On the broad ground that fraud vitiates all contracts, a conveyance made with design to avoid the payment of a just debt, or to defeat the recovery of a pre-existing right, is void as it respects creditors; and the pendency of a suit is one of the many badges of fraud, which would induce a Court of equity to set aside such conveyance, or a jury to regard it as a nullity, in a trial at law. The pendency of an action is constructive notice of the matter involved in that suit, and a purchaser of the property which is the immediate object of the pending action will be affected by it, as a purchaser with notice. But a *lis pendens* is not even constructive notice of any other [*259] points than *those which are in dispute between the parties to such action. 3 Atk. 392; Newl. on Con. 506, 507. So much, then, of the instruction as states that a transfer of property, made during the pendency of an action of slander, is of itself fraudulent, whether with or without consideration; and that all persons are bound to take notice of the pendency of such action, in the unqualified manner there expressed; is unsupported by authority. Not having the evidence before us, we can not say how far these instructions might tend to influence

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the verdict; but there is reason to presume that the jury might have been misled by them.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Smith, for the plaintiffs.

M'Kinney, Morris, and *Perry*, for the defendant.

M'NEELY v. DRISKILL.

ARREST—JUSTIFICATION—AFFIDAVIT.—A. made an affidavit before a justice of the peace, stating that he had lost certain goods, which he believed were concealed in the possession of B. The justice thereupon issued a warrant against B. for larceny. B. was arrested on the warrant and afterwards acquitted. *Held*, that A.'s affidavit contained no criminal charge, and that he was not therefore liable to B. in an action for a malicious prosecution.

APPEAL from the Washington Circuit Court.

SCOTT, J.—On the application and affidavit of M'Neely before William Richards, a justice of the peace of Washington county, a search warrant was issued; and the property described in the warrant was found in the possession of Driskill. The constable, as he was commanded, arrested Driskill and took him, with the property, before Asher Wilcox, another justice of the peace of said county; who, on hearing the cause, adjudged Driskill not guilty and discharged him. Driskill then brought an action on the case for malicious prosecution, and obtained judgment in the Washington Circuit Court; from which judgment this appeal is taken.

The appellant has assigned several reasons for reversing the judgment in this case, but one of which we deem it necessary to notice. The affidavit made by the [*260] appellant before *William Richards, Esquire, did not authorize the justice to issue the warrant complained of. The following is the affidavit: "State of

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Indiana, Washington county, to wit. Be it remembered, that on the 24th day of December, 1827, personally came before me, William Richards, a justice of the peace of said county, Robert M'Neely of said county, and upon his oath solemnly saith, that he lost out of his enclosure, in Brown township in said county, five hogs, two sows, and three barrows, within fifteen days last past; and that he believes that they, or a part of them, are concealed in the custody of Elisha Driskill, Sen., of Brown township in said county. And further this deponent saith not.—Robert M'Neely.” The action is brought for wrongfully and maliciously prosecuting the appellee on a charge of larceny. This affidavit shows a state of facts on which an action of trover might have been maintained, but it contains no charge of larceny against any person. The appellant had lost his property, and wished to recover it; he states that fact to a justice of the peace. The justice forms his judgment upon the facts stated; he issues his mandate to an officer to search for the property, and to bring the person, in whose possession it may be found, before himself or some other justice of the peace, &c. This was an error; but it is the error of the justice, and not of the appellant. And if a justice of the peace, by mistake of judgment, conceives an act to be felony which is not felony; and in consequence of that mistake, causes an innocent person to be arrested and imprisoned; the law will not hold the person who made the complaint responsible, in this form of action, for the consequence of such errors. 3 Esp. Rep. 165. The judgment must be reversed.

Per Curiam.—The judgment is reversed with costs.

Thompson, for the appellant.

Stevens, for the appellee.

TAYLOR v. M'CRACKIN.

WIDOW—DOWER—TITLE-BOND—EJECTMENT.—A. died in possession of a tract of land, which he held by virtue of a title-bond executed by C. The

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widow of A. remained in possession and married B., who also continued in possession. C. having the legal title, brought an action of disseisin for the premises against B. without having previously demanded the possession.

[*261] **Held*, 1st, that though the statute gives to the widow of A. a right of dower in the equitable estate, her claim constituted no defence in law to the action of disseisin brought by C.

Held, 2d, that the statutory provision—authorizing the widow to continue in possession of the mansion-house, and the messuage thereto belonging, until her dower is assigned—applies only to the persons claiming under her deceased husband, and not to those claiming by an adverse title.

Held, 3d, that though a judgment, in the action of disseisin, settles the titles held by the parties at the time of its rendition, it does not prevent the losing party from enforcing a superior title subsequently acquired, nor preclude either of the parties from applying to a Court of chancery to perfect his title, or to enjoin a judgment obtained contrary to equity.

Held, 4th, that C. could not sustain his action of disseisin against B. under the circumstances of this case, without having previously demanded of him the possession of the premises.

APPEAL from the Hendricks Circuit Court.

HOLMAN, J.—William M'Crackin commenced an action of disseisin against Isaac Taylor, for a tract of land in Hendricks county, on the 3d of January, 1829. Taylor pleaded not guilty. He also pleaded that William M'Crackin, who was possessed of the legal title to the said tract of land, bargained and sold the said land to Robert M'Crackin, and executed to said Robert a title-bond for said land. This bond is set out in the plea; is dated the 31st of May, 1826; is in the penalty of 1,000 dollars, conditioned for the conveyance of the said tract of land to the said Robert, his heirs, &c.; and is under the seal of the said William M'Crackin. This plea states that, at the time of executing said bond, the said William put the said Robert into peaceable possession of the said land, who continued to reside thereon until the 9th of June in the same year, when he departed this life, leaving Mary M'Crackin, his widow, in peaceable possession; that said Mary, being entitled to dower in the said land, continued in possession of the mansion-house, and messuage thereunto belonging, situated on the said tract of land; and that while so in

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possession, on the 27th of December, 1827, she intermarried with the said Taylor, who, in right of his said wife, still continues in possession of the mansion-house and messuage aforesaid, dower of the said land not having been assigned to the said Mary, nor to the said Taylor. To this plea there was a demurrer; which was correctly sustained; not only for the cause of demurrer assigned, viz., that the act of assembly authorizing this ac- [*262] tion contemplates the whole case to *be tried on the issue of not guilty; but also because the subject-matter of the plea is not a legal bar to this action.

The claim by which Robert M'Crackin, in his life-time, held this land, was only an equitable title; and although the act of assembly provides that the widow shall be endowed of one-third part of all the lands, whether legal or equitable, of which her husband was seized during the coverture; yet when she is endowed of an equitable estate, she receives but a title in equity, which can not be set up at law in bar of a legal title. The act of assembly gives her a legal right to an equitable estate, but it does not convert her equitable estate into a legal one. It still remains a subject of a Court of chancery, and of which a Court of law can not take cognizance. The provision of the act of assembly, that authorizes the widow to continue in the mansion-house, and the messuage thereunto belonging, until her dower is assigned, relates only to her claim against the heirs, or those claiming the estate under her deceased husband, and does not extend to strangers or persons claiming by an adverse title. The widow, under the act of assembly, has no higher title than the husband had in his life-time. She may maintain her possession of the mansion-house, and the appurtenant messuage, until her dower is assigned, by virtue of her husband's title, whether legal or equitable, against any person who claims under the same title; but she is in no better condition to defend her possession, against an adverse or paramount title, than her husband would have been. And it will not

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be contended that the husband, in his life-time could have defended his possession to these premises, by virtue of this title-bond, against the legal title set up in the declaration. If Robert M'Crackin, in his life-time, had a clear equity in this tract of land by virtue of this contract, he might have compelled a specific performance of the contract; and those claiming under him have the same equitable right to have the contract specifically performed. But until there is a performance of the contract, the law can take no notice of the title to the land created thereby. *Porter's heirs v. Robinson*, 3 Mar. 253.

It is contended in support of this plea that, if it is not allowed, the right of dower in this case will be perpetually barred; inasmuch as the act of assembly declares,

that the judgment in an action of disseisin shall [*263] be conclusive upon the parties, and *shall be a

bar to another suit for the same cause, upon titles held by them at the time of such judgment. There is nothing here to affect this right of dower, if Robert M'Crackin in his lifetime had an equitable title to this land. The judgment in the action of disseisin is conclusive on the parties, in the same manner as judgments in personal actions and in writs of right. Under the act of assembly, the judgment settles the controversy between the parties, about the titles held by them at the time it is rendered; but if the losing party should afterwards acquire a superior title, he is not barred by the judgment from enforcing that title in another action. But this clause in the act of assembly, has no bearing upon the right that either party has to the interposition of a Court of chancery in his behalf, in order to perfect his title, or to enjoin proceedings on a judgment obtained contrary to equity.

The evidence given in this case is set forth in a bill of exceptions, from which it appears that Robert M'Crackin was the son of William M'Crackin, and was in possession of the land in controversy with the knowledge and con-

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sent of his father; that he improved the land, and continued in possession for several years, and until the time of his death, without the payment of rent; that his widow continued in possession, and enjoyed the land, until her intermarriage with Taylor; and that Taylor lived with his said wife on the land, and still continued to hold possession. There was no proof of notice to quit, or demand of the possession, before the commencement of this action; and the Court instructed the jury that three months' notice to quit was unnecessary. On the trial, Taylor offered in evidence to the jury the bond from William M'Crackin to Robert M'Crackin, for the conveyance of said tract of land as set forth in his plea: the execution of which bond was proved by one of the subscribing witnesses. And although, as the bill of exceptions states, it was admitted that Robert M'Crackin was in possession of the land when the bond was executed, and continued in possession until his death, and that his widow held possession until her intermarriage with Taylor, and that Taylor ever since continued in possession, yet the Circuit Court rejected the evidence, and would not permit the bond to go to the jury.

The plaintiff obtained a verdict for damages, on [*264] which a judgment was rendered for the possession of the premises, and the damages assessed by the jury.

It is here contended that the judgment is erroneous, inasmuch as there was no notice to quit, nor any demand of the possession, prior to the commencement of the action. On this subject there is some uncertainty. The act of assembly authorizing this action is silent on the subject of notice to quit, or demand of the possession of the disseisor, or person in possession; and the general tenor of the act of assembly and the nature of the action of disseisin, seem to lead to the idea that no notice is necessary. But when we consider the consequences that may result to tenants in possession from this construc-

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tion, we feel unwilling to admit it in its full extent. The act of assembly states that the remedy, provided by this action, shall embrace all the various remedies known to the common law for enforcing the delivery of possession or seizure of lands, &c.; but we presume it was the intention to embrace those various remedies with some degree of consistency. Although it may embrace some of the advantages of both a real and a mixed action, and be founded on the right of property as well as the right of possession; yet we can not consider the defendant as a wrong-doer, and demand damages and costs against him, while resting for support upon mere right, as in a writ of right, when neither damages nor costs are recovered. At common law a disseisor was a wrong-doer; for if he was recognized as in possession as a tenant in any capacity, the action would not lie; and the action of ejectment will not lie against a tenant at will, until the will of the landlord is determined; 2 Stark. Ev. 530; and we think it inconsistent with the principles of justice to subject a man to costs of suit for holding lands of which he has no reason to suppose the owner wants possession. We therefore think the doctrine of notice to quit, and demand of possession, is applicable to this action as to the action of ejectment, and we shall consider the subject accordingly.

The act of assembly, respecting the notice that is to be given to tenants for years or at will holding over, is not applicable to this case, as here is no rent reserved; nor has this case any features that will enable us to recognize it as such a tenancy as requires notice to quit, to be given any particular length of time before the action is brought. But as Robert M'Crackin was in peaceable possession, with the knowledge and consent of William M'Crackin, and as Taylor continued to hold the premises by virtue of Robert M'Crackin's possession, we can not look upon Taylor as a wrong-doer, which is subject to an action without any notice or demand whatever. Taylor, as to his possession, stands in the same re-

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lation to William M'Crackin that Robert M'Crackin did in his life-time ; and it would seem contrary to the principles of justice to have subjected Robert M'Crackin to this action, before the possession had been demanded and refused. Here has been an unmolested possession for about five years, with the knowledge and consent of the owner of the land, which would certainly place the possessor in the condition of a tenant at will, who would not be liable to an action of ejectment, until he had received express evidence that the owner of the land had determined his will, either by a notice to quit, a demand of possession, or by some other act that would determine the tenancy. 2 Stark. Ev. 530.

Directly connected with this subject is the title-bond for this land that was offered in evidence and rejected. This bond was inadmissible as a bar to the action, but it was important to show in what character Taylor held the possession of his land ; and taking the bond as it appears on its face, in connection with the other testimony, it presents conclusive evidence that he was not in possession as a trespasser or disseisor, but that he held a possession which a Court of chancery would guaranty, by compelling a specific performance of the contract under which he claimed ; and surely he had a right to show by that contract, that he was entitled to at least a demand of the possession before he could be subject to this action. In the case of *Right v. Beard*, 13 East, 210, the plaintiff put the defendant into possession under a contract of sale, and shortly afterwards commenced an action of ejectment against him. The plaintiff was non-suited ; the Court holding that as the defendant was put in possession by virtue of a contract, he was not liable to the action until the possession was demanded. See also the same principle in the cases of *Jackson v. Bryan*, 1 Johns. 322 ; *Jackson v. Rowan*, 9 Johns. R. 330. But if the defendants, in these cases, had been precluded from proving the contracts by virtue of which they entered, they must

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[*266] *have been considered as wrong-doers, and compelled to pay the costs of suit, without notice to quit, or demand of possession. We think, therefore, that Taylor had a right to show the nature of the contract by virtue of which he was in possession; and for this purpose, the bond should have been admitted in evidence.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Brown and Hester, for the appellant.

Fletcher and Gregg, for the appellee.

LOGAN v. SIGGERSON.

TRESPASS—JUDICIAL ACT—PLEADING.—Trespass de bonis asportatis. Plea, that the defendant, as a justice of the peace had entered a fine against the plaintiff for an assault committed by him in the defendant's presence. *Held*, on demurrer, that the plea was bad, because it did not show but that the fine was imposed in the offender's absence.

APPEAL from the Marion Circuit Court.

SCOTT, J.—The appellee, who was plaintiff in the Circuit Court, declared against the appellant in an action of trespass for tortiously taking three saws and converting them to his own use. The defendant pleaded the general issue, which was afterwards withdrawn. He also pleaded specially, that at the time when, &c., he was an acting justice of the peace, and had full power and authority to inquire into, and in a summary way to punish by fine not exceeding three dollars, all trivial breaches of the peace, and to give judgment and award execution; that at the time when, &c., by consideration and judgment of the said defendant as justice of the peace, it was adjudged that the state of Indiana should recover against the said plaintiff the sum of two dollars as a fine, and fifty cents as costs, for an assault which he, the said plaintiff, had, in the presence and view of the said defendant, committed on the

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body of one William Logan, &c.; that he issued execution, and that the goods in the declaration mentioned were levied on and sold, &c. To this plea the plaintiff replied, that William Logan who, it is alleged, was assaulted, and William Logan the defendant who [*267] as *a justice of the peace imposed the fine, are one and the same person, and that the said assault was not committed upon the said William Logan, when he was in the execution of his office as a justice of the peace. General demurrer to this replication, and joinder. Demurrer overruled. Writ of inquiry and final judgment for the plaintiff.

The plea is defective. It was not enough that the defendant should show, in his plea, that he had authority to impose a fine for an assault. He should have shown, also, that he had caused the offender to be brought before him, and had thus obtained jurisdiction of the person, as well as of the crime. For aught that appears in the plea, the fine might have been imposed in the absence of the offender, and without any notice to him of the amount of the fine, or even of its existence, till he was visited by the officer with the execution in his hand. The replication is defective also; but the plea being bad, the defendant could not take advantage of it. The demurrer carries us back to the first error. Setting aside the parts which are defective, nothing remains but the declaration; and, as the plaintiff has the judgment below it must stand.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

Fletcher, for the appellant.

Wick, for the appellee.

Louisville and Portland Canal Company v. Holborn, in Error.

LOUISVILLE and PORTLAND CANAL COMPANY v. HOLBORN, in Error.

REPLEVIN—CUSTODY OF LAW (a).

A., to whom B. was indebted, levied an attachment on certain goods as B.'s property. C., the owner of the goods, brought an action of replevin against A. and recovered (1).

(1) Replevin lies in such cases as that in the text; and it is no objection to the action that the goods are in the custody of the law. *Chinn v. Russell*, ante, p. 172, and note (3).

[*268] *MARKLE and Another v. RAPP and Others, in Error.

MORTGAGE—FORECLOSURE—REMEDY (b).

A PERSON, holding a bond and mortgage for a debt, may proceed first by an action on the bond, and subject all the debtor's property both real and personal to his judgment, without abandoning his lien on the mortgaged premises, unless he have taken them in execution. But if the creditor elect to proceed first on his mortgage, he is obliged by the statute of 1824 to rely alone on the mortgaged premises for a satisfaction of his demand (1).

(1) This statute of 1824 is repealed. Vide note to *Youse v. M'Creary*, ante, p. 246. As to the law on the subject, independently of the statute, vide *Stevens v. Dufour*, Vol 1, of these Rep. 387.

CHINN and Another v. PERRY.

WITNESS—COMPETENCY—VALUE.—Goods were taken in execution; and a delivery-bond payable to the execution-plaintiff was executed by the debtor and his surety, conditioned for the delivery of the property in as

(a) 6 Blkf. 136; 4 *Id.* 304. (b) 13 Ind. 75.

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good order as it was at the date of the bond. Debt on the bond. Breach, the non-delivery of the property in as good order as it was when then the bond was executed. Demurrer to the declaration and judgment for the plaintiff.

Held, on the execution of the writ of inquiry, that the sheriff was a competent witness to prove the value of the property. *Held*, also, that, in the absence of all testimony as to the value of the property, the amount of the execution was the proper measure of damage. *Held*, also, that the *quantum* of damages sustained by the plaintiff for the breach of contract, was the only subject of inquiry before the jury.

ERROR to the Decatur Circuit Court.—This was an action of debt by Perry against Chinn and Parks, founded on a delivery-bond payable to Perry, the execution-plaintiff.

HOLMAN, J.—Declaration on a bond for the delivery of property taken in execution. The undertaking in the condition of the bond was, to deliver the property “in as good order as it then was.” The breach, *inter alia*, is, that the property was not delivered, nor any part thereof, “in as good order” as it was at the date of the bond. Demurrer to the declaration. Demurrer overruled, interlocutory judgment given, and writ of inquiry awarded. [*269] The sheriff, by whom the property was *taken in execution, and by whom the delivery-bond was taken and attested, was introduced, on the inquest of damages, to prove the value of the property. The defendants objected to his admission on the ground of his incompetency, but he was admitted by the Court; to which opinion of the Court the defendants excepted. The defendants moved the Court to instruct the jury of inquest, that if the property was delivered at the time and place mentioned in the bond, but not in good order, then the proper measure of damages to be assessed was the difference between the value of the property at the time the bond was executed and the time of the delivery. This instruction the Court refused to give, but instructed the jury that they were not impaneled to say whether the property was delivered or not; but simply to inquire what damages the

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plaintiff had sustained by the non-delivery; and that whether the property was delivered pursuant to the condition of the bond, or whether it was delivered in good order, were not questions in issue before the jury. To this opinion, also, the defendants excepted. There was an assessment of damages, and a judgment for the plaintiff.

The defendants in the Circuit Court, the plaintiffs in this writ of error, rely upon the admission of the sheriff as a witness, and the instructions of the Circuit Court to the jury, being the errors assigned for a reversal of this judgment. But there is no error in the proceedings. The sheriff was not interested, and of course was a competent witness. He was the subscribing witness to the bond, and would have been competent to prove its execution. There was nothing he could gain or lose, by the result of his testimony, as to the value of the property. Besides, in the absence of all testimony as to the value of the property, the amount of the execution was the proper measure of damages (1). The instructions of the Circuit Court to the jury are unexceptionable. The demurrer admitted the non-delivery of the property in as good order as it was in when the bond was executed, and a delivery in no other order would have been a compliance with the undertaking. The damages sustained by the plaintiff on account of the non-delivery was the only subject before the jury.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

[*270] * *Wick*, for the plaintiffs.
 Sterens, for the defendant.

1. Vide *McCoy v. Elder*, ante, p. 183, and note.

SHELMIRE v. THOMPSON and Others.

REFORMATION—RES ADJUDICATA—INJUNCTION.—A. B. and C. executed a note to D. for the payment of money. The name of C. was afterwards

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erased without the knowledge of the other obligors, and a judgment obtained against A. and B. A bill was filed by A and B. in order to have the judgment enjoined, averring their ignorance of the erasure at the time of the trial at law. *Held*, that the erasure was a defence purely legal, and that the complainants' ignorance of the erasure as averred, was no ground for the interposition of a Court of chancery (a).

APPEAL from the Martin Circuit Court.

HOLMAN, J.—Thompson, Allen, and Conner, filed a bill in chancery in the Martin Circuit Court, praying relief by injunction against a judgment at law, obtained against them and others by E. Shelmire. The bill states that on the 30th of January, 1821, F. Sholts was indebted to E. Shelmire, who is made defendant to the bill, in the sum of 704 dollars and 41 cents, for which sum Sholts and the complainants, together with J. Johnson and divers others, executed their joint and several note under seal; on which note suit was afterwards instituted, and a judgment obtained against all the obligors, except Johnson and one who had died; and although it appears by the record that D. Hart, Esq., appeared in behalf of the defendants in said suit, yet they never did employ him or any other person to appear for them. The complainants also state that they would not have executed said note, as the sureties of Sholts, had not all the other sureties, including Johnson, joined in its execution, and that Johnson did sign and seal said note; but that the name of Johnson was afterwards designedly erased, without their knowledge or consent, by some person to them unknown, whereby the note became null and void, and not their note, as they are advised and believe; that at the time of the trial at law, they did not know that the signature and seal of Johnson had been erased, nor that he was not a co-defendant with them; and that if they had known that fact, they [*271] would *have defended the action at law. They require the defendant's answer, particularly as to the erasure, and the person by whom it was done; and

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they pray an injunction, which was granted. The defendant, in answer, denies all knowledge of when, how, by whom, or for what purpose the erasure was made, and claims all legal advantages. C. R. Brown, one of the obligors against whom the judgment was given, and who the defendant contends is an incompetent witness, deposes, that the defendant put this note into his hands, among others, to be put in suit; that, after looking at the note, he informed her that Johnson was sheriff, and another of the obligors coroner, so that there was no person to serve process; that she remarked that Johnson was good for nothing, and she would scratch his name off; but he advised her not to do so without the knowledge and consent of all the obligors, and left the note with her; that, in the evening of the same day, the note came to him from the defendant, with directions to commence suit on it immediately; and at that time the name of Johnson had been obliterated by drawing a pen over it. From the record in the suit at law, it appears that D. Hart appeared as counsel for the defendants, and had oyer of the note. The Circuit Court decreed a perpetual injunction of the judgment at law, as to the complainants; but the decree was not in any manner to affect the other judgment-defendants. The defendant appealed to this Court.

We see no principle in equity by which this decree can be supported. The case presents no ground of relief. Admitting all the complainants have stated in their own favor, taken in the strongest point of view, they have not made out a case in which a Court of chancery can interpose. If their character as sureties would, under the circumstances of the case, entitle them to any particular indulgence; and if they did not employ counsel to defend the suit at law, and are not bound by the acts of their co-defendants, who perhaps employed counsel in their behalf; and if, as they insinuate by their witness, the erasure was made by the appellant, or with her knowledge and consent; still their claim to relief in equity is un-

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founded. Their right to bar a recovery on this note on account of the erasure of Johnson's signature is purely legal; and, except as to Johnson's proportion of the amount of the note, it exists in law without a shadow of [*272] equity. But even if this judgment were *contrary to equity, the reasons assigned for not defending at law, are wholly insufficient to authorize the relief required. A Court of chancery will not relieve against a judgment contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit at law, or it could not have been received as a defence, or unless he was prevented from availing himself of the defence by fraud, or accident, or the act of the opposite party, unmixed with negligence or fault on his part. The cases which support this principle are numerous. We will only mention *Cowan v. Price*, 1 Bibb, 173; *Lansing v. Eddy*, 1 Johns. Ch. R. 49; *Duncan v. Lyon*, 3 Johns. Ch. R. 351; *Foster v. Wood*, 6 Johns. Ch. R. 87. In this case nothing is alleged, as a reason for not defending at law, but ignorance of the erasure. There is nothing to excuse this ignorance. It was occasioned by negligence alone. And we know of no principle or precedent that authorizes relief. The decree must be reversed and the bill dismissed.

Per Curiam.—The decree is reversed with costs. Cause remanded, with directions to the Circuit Court to dismiss the bill, &c.

Law and Kinney, for the appellant.

Judah and Dewey, for the appellees.

END OF MAY TERM, 1829.

[*273]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1829, IN THE FOURTEENTH YEAR OF
THE STATE.

DOUGHERTY *v.* HUMPHSTON, on Appeal.

SPECIFIC PERFORMANCE—DISCRETION—EQUITY PRACTICE (a).

A. SOLD to B. a tract of land, and gave him a title-bond conditioned for the execution of a deed for the land, when a patent for the same should be obtained from the United States. A. had paid to the United States one-fourth of the purchase-money. B. executed his notes to A. for the price of the land, payable part in labor and part in money, and agreed to complete the payments due to the United States on the land. A. afterwards assigned the land-office certificate for the land to C., who had notice of B.'s title-bond; and C. paid the balance of the purchase-money due to the United States, and obtained a patent for the land. B. filed a bill in chancery against C., setting out the above facts; averring a performance of the labor, and a payment of part of the money payable

(a) 6 Ind. 259.

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to A.; and praying for a conveyance of the land. *Held*, that as the bill did not show a payment or tender of all the money payable to A. by the contract, and a payment or tender to C. of the balance of the purchase-money paid by him to the United States, it should be dismissed for want of equity.

A bill for a specific performance of a contract, [*274] is addressed *to the discretion of the Court; and it should always show that the complainant had done all which could be equitably required of him.

When a conveyance is decreed to be executed in such a case, the usual form is, to require the person who has the legal title to execute the conveyance, if he is of legal discretion and within the jurisdiction of the Court.

SHEETS v. ANDREWS.

CONTRACT—PERFORMANCE—DEMAND.—If the owner of real estate covenant to make a title to it on payment of the purchase-money, and the same be afterwards paid, the obligor is not liable to an action for not conveying, unless the deed have been previously demanded.

Quere, whether the purchaser, in such case, should tender the deed to the vendor for execution.

WARRANTY—BREACH—DAMAGE.—In the case of a breach of the covenant of seisin, or of warranty, contained in a conveyance of real estate, or of a breach of a covenant to convey, the measure of damages, if there be no fraud, is the purchase-money with interest (a).

APPEAL from the Jefferson Circuit Court.

BLACKFORD, J.—This was an action of covenant, by Andrews against Sheets, on the following obligation: “I hereby promise and oblige myself, my heirs or legal representatives, to convey unto Stephen Andrews, his heirs or assigns, by general warranty deed of conveyance, lots numbered 96, 97, 101, 129 and 130, in the additional plat of the town of Vevay, Indiana, on or before the 3d of

(a) 7 Ind 450.

May, 1820, or so soon thereafter as payment shall be made in full for said lots, agreeably to three several notes given for the same, bearing even date with these presents at six, twelve, and eighteen months, with interest from the date if not punctually paid. Given under my hand and seal the 3d day of November, 1818.—*John Sheets*, (Seal).” The declaration avers payment of the purchase-money on a certain day, before the commencement of the suit; and alleges that the defendant, although often requested, had not made the conveyance. To this action, Sheets, the defendant below, after obtaining oyer of the obligation, pleaded several pleas in bar; one of which is to the following effect:—That the defendant had been always ready, willing, and able to execute the [*275] *conveyance agreeably to his covenant; but that the plaintiff had never requested him to do so. This plea further states that the defendant was still ready, able, and willing to execute the conveyance; and that he had brought it into Court and then tendered it to the plaintiff for his acceptance. To this plea, as well as to the others, Andrews, the plaintiff below, demurred generally, and the defendant joined in demurrer. The Circuit Court, considering the pleas no bar to the action, gave judgment on the demurrer in favor of the plaintiff below. The damages were assessed at 976 dollars and 5 cents, being the amount of the purchase-money with interest; and final judgment was rendered for that amount, together with costs. Sheets, the defendant below, appeals to this Court.

The validity of the plea, to which we have referred, depends upon a single question. It is this: If the owner of real estate covenant to make a title to it, on payment of the purchase-money, and the same be afterwards paid, is the obligor liable to an action for not conveying, although the deed has not been demanded? The Court has heretofore expressed an opinion, that, in cases of this kind, the plaintiff might recover without any proof of

such a demand. We have, however, for some time, had doubts as to the correctness of that opinion; and have now, after much reflection, come to the conclusion that it must be overruled. It appears to us to be reasonable, that the parties to these contracts, which are very common in our country, should each have a fair opportunity to perform his part, previously to his being liable to a suit for the non-performance.

The statute of 1824, pp. 329, 330, rendering bonds like the present, usually called title-bonds, assignable, furnishes a strong reason, were there no other, to show that the *bona fide* obligor in these cases, having a good title, should not be subject to a suit for not conveying, until he had been called upon for the deed. The title-bond, by means of assignments, may, and frequently does, pass through the hands of many persons, before the payment of the purchase-money by the obligee, according to his contract. It must, consequently, often happen, that neither the obligor nor obligee, at the time of the payment, can know who has the bond and is entitled to the conveyance. In cases so situated, if no previous demand of the deed be necessary, the obligor may have no opportunity

[*276] *to prevent an action founded on a breach of his contract, notwithstanding he may have been always ready, and able, and anxious, to perform it. The consequence would be that the holder of the bond, not being known to the obligor, might keep it until the property had become greatly reduced in value, and then recover damages to the whole amount of the purchase-money and interest, without the obligor's having had any opportunity to prevent it, by a compliance with his agreement. In this way, the holder of the bond could take advantage of his own wrong, to the injury of a *bona fide* vendor. To avoid this difficulty, Andrews, the defendant in error, contends that the obligor might tender the deed to the obligee, at any time before notice of the assignment; which tender would be as effectual as if it were

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made to the holder of the bond. The answer to this is, that the obligee would always have it in his power to prevent the effect of the tender, by merely informing the obligor at the time—as it would be his duty to do—that the bond had been previously assigned.

Independently, however, of the statute, making title-bonds assignable, the rule which requires that the deed be demanded in these cases, before the commencement of a suit for not executing it, appears to us to be proper and necessary. It is best calculated to secure the specific execution of contracts, and to prevent a multiplicity of law suits. Besides, it may be often a convenience to the purchaser, for a variety of reasons, not to receive the title as soon as he is entitled to it; and he may therefore prefer its continuance, for some time, in the vendor. If he can obtain the title to which he has a right, whenever he may choose to demand it, he ought not to complain. There is, indeed, respectable authority for the opinion that it would have been better had the law required a demand previously to a suit, even in cases where money only has been contracted for. The law, it is true, as to that has long been settled to be otherwise. But the fact that its policy has been thus questioned where money alone is to be paid, is a strong ground to show that the rule dispensing with any demand upon the obligor for performance, before a suit against him for non-performance, should not be applied but with great caution to any other contracts than those for the payment of money. We are now well

satisfied that it should not be extended to conveyants, like the *one under consideration, for the [*277] conveyance of land. An eminent English writer upon this subject says: “A vendor can not bring an action for the purchase-money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing. And, on the other hand, a purchaser can not maintain an action for breach of contract, without having tendered a conveyance and the pur-

chase-money." Sugden on Vendors, pages 162, 163. We are not now called on for an opinion as to whether the purchaser should pursue the English practice by not only demanding the conveyance, but also by tendering it for execution. It is sufficient for the present purpose to say that this suit could not be maintained, unless, previously to its commencement, the deed had been demanded.

Upon this view of the subject, the plea to which we have particularly referred, denying that any demand of the deed had been made, is a bar to the action. The contrary opinion heretofore expressed in *Deming v. Bullitt*, *Cunningham v. Flinn*, and *Andrews v. Sheets*, is, of course, overruled (1).

With respect to the question which has been raised in this cause, relative to the measure of damages, the opinion of the Circuit Court is considered to be correct. The same opinion was expressed by this Court at the May term, 1828, in the case of *Blackwell v. The Board of Justices of Lawrence County* (2). It appears to us that where no fraud is alleged, the purchase-money, with interest, should be the measure of damages, whether the breach complained of be of the covenant of seisin or of warranty contained in a conveyance, or whether it be, as in the present case, of a covenant to convey.

The judgment, however, must be reversed upon the first objection taken by the plaintiff in error; and which we have already examined. The plea in denial of the demand being good, the demurrer to it was erroneously sustained.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the joinder in demurrer, are set aside, with costs. Cause remanded, with directions to permit the plaintiff below to withdraw his demurrer and reply to the plea.

Stevens, for the appellant.

Hawk and Sullivan, for the appellee.

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[*278] (1) *An action of covenant was brought by a vendee against a vendor of real estate. The covenant on which the suit was founded, was, that the vendor, in consideration of a certain sum *paid* to him, would convey to the vendee, at a certain time, a certain tract of land. Plea, that the defendant *had not been requested* to convey, &c. Demurrer to the plea. *Per Curiam*.—On the merits, it is impossible to distinguish this case from *Fuller v. Hubbard*, 6 Cowen, 13, and *Hackett v. Huson*, 3 Wendell, 250. In the latter case, particularly, the consideration *had been paid*, as in this case, and the conveyance was to be executed by a particular day; but the same rule was held applicable, which had been previously applied, when the payment of the consideration and the giving of the deed were to be simultaneous acts. It may be considered the rule of this Court, that when a party covenants to convey, he is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and having waited a reasonable time to have it drawn and executed, has made a second demand. In England, the party entitled to the deed is bound to have it drawn and presented for execution. We have not gone so far. The party who is to give a deed, certainly should have it drawn at his own expense; but upon such a covenant as that declared on in this case, the covenantor is not bound to prepare the conveyance until it is demanded, when it is his duty to execute and perfect the conveyance with all reasonable dispatch, and hold it ready for delivery when called for. The purchaser, no doubt, may prepare the deed and tender it for execution, and then but one demand is necessary. *Connelly v. Pierce*, 7 Wend. 129.

A purchaser is not bound to prepare and tender a deed to the vendor, unless such an obligation can be inferred from the terms of the contract. *Fairfax v. Lewis*, 2 Rand. 20.

(2) Ante, p. 143. On the ancient writ of *warrantia charte*, the feoffee, in case of eviction, only recovered other lands as valuable as those, from which he was evicted, were at the date of the warranty. The personal covenants in a conveyance—of seisin, of right to convey, against incumbrances, of quiet enjoyment, and of warranty—were introduced in the place of the ancient warranty. And it has been generally considered, that the measure of damages for a breach of any of the substituted covenants, should be similar to that which existed for a breach of the original one. Chancellor KENT examines this subject and refers to the principal authorities. He concludes as follows: "The ultimate extent of the vendor's responsibility, under all or any of the usual covenants in his deed, is the purchase-money with interest, and this I presume to be the prevalent rule throughout the *United States*." 4 Kent's Comm. 2d Ed. 476.

WEATHERS v. THE STATE.

PERJURY—MATERIAL MATTER—INDICTMENT.—An indictment for perjury must show conclusively, that the testimony given by the defendant, and charged to be false, was material to the issue on the trial of which he was sworn.

ERROR to the Ripley Circuit Court.

Weathers v. The State.

HOLMAN, J.—William Weathers was indicted for perjury in the Ripley Circuit Court. The indictment [*279] states that on the *27th of October, in the year 1828, on the trial of a certain issue, in the Ripley Circuit Court, wherein Gardner Woodbury was plaintiff, and Daniel Ross, Samuel Hodges and Reuben Hodges were defendants, duly joined on the plea of payment to a certain note in writing under seal, regularly executed by the said defendants, William Weathers appeared as a witness for the defendants, and took his corporal oath, &c., to speak the truth, &c., touching the matters in question in the issue joined as aforesaid; that, on the trial of the said issue, certain questions became and were material, that is to say, whether he, the said William Weathers, had paid one Robert Knowlton, the assignor of the said plaintiff, before the assignment of the said note, the sum of 73 dollars, for the defendants aforesaid; and that the said William Weathers, on the said 27th of October, in the year 1828, in the said Ripley Circuit Court, on his oath aforesaid, on the issue aforesaid, knowingly, falsely, &c., amongst other things, did depose and swear, that he, the said William Weathers, had, before that time, paid to the said Robert Knowlton, the assignor of the said note, the sum of 73 dollars, on the said note, for the said defendants; whereas in truth and in fact, the said William Weathers, at the time when he so swore as aforesaid, had not before the time when he so swore as aforesaid, nor before the assignment of the said note to the said plaintiff in the action aforesaid, nor at any other time, paid the said Robert Knowlton the said sum of 73 dollars, nor any other sum of money on the said note. On this indictment Weathers was found guilty by a jury, who assessed his fine at 50 dollars, and found that he should be imprisoned in the prison of the state for one year. Motion in arrest of judgment overruled, and judgment given on the verdict. To reverse this judgment Weathers has prosecuted his writ of error.

This judgment can not be sustained: it should have been arrested by the Circuit Court. The indictment is insufficient, inasmuch as it does not show conclusively that the testimony given by Weathers was material to the issue between Gardner Woodbury, plaintiff, and Daniel Ross, Samuel Hodges, and Reuben Hodges, defendants. The facts sworn to must be material, in order to constitute the crime of perjury. A man may knowingly and corruptly swear falsely, and yet not be guilty of perjury.

And the indictment, in order to allege the crime [*280] of *perjury, must unequivocally aver that the facts sworn to were material. Nothing is to be taken by intendment. Here the indictment says, that it was material whether Weathers had paid 73 dollars to Knowlton, for the defendants, before the assignment of the note. Now, if the indictment had stated that Weathers swore that he had paid 73 dollars to Knowlton before the assignment of the note, the testimony would have been material within the terms of the indictment. But such was not the testimony of Weathers. He did not swear, as we understand the expressions in the indictment, that he paid the money to Knowlton before the assignment of the note, but that he had paid the money before that time—the time when he gave his evidence.

The indictment does not say that the question whether Weathers paid the money to Knowlton after the assignment of the note was material; nor does it charge that he swore that he paid it before the assignment; therefore the deduction is clear, that the swearing may have been to a fact that the indictment does not allege to have been material. If the allegation of materiality in the indictment is not sufficiently broad to cover the facts sworn to by the defendant, it is just the same as if the indictment contained no allegation of the materiality of the facts sworn to at all. And surely no lawyer would contend that an indictment would be good without an allegation that the facts, to which the defendant deposed, were ma-

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terial. It therefore appears to us that, if we take the whole of the indictment as true, it does not fix upon the defendant the charge of perjury; for if the question of a payment to Knowlton, at any time subsequent to the assignment of the note, was not material, the swearing of Weathers, though false, may not have amounted to perjury. In fixing this conclusion it must be remembered that the indictment does not pretend that the time when the note was assigned, and the time when Weathers gave this evidence was the same; and in the very nature of the transactions, some time must have elapsed after the assignment of the note before the defendant gave this evidence relative to this payment; and a question of payment, during this interval of time, is not said by the indictment to have been material; and for aught that appears in the indictment, it may have been in this interval of time, when the defendant swears that he paid the money to Knowlton.

The attorney for the state supposes that the averment in the indictment that Weathers had not, before the time when he so swore, nor before the assignment of the said note, paid the said 73 dollars, removes this objection. But an averment that Weathers had not paid the money before the assignment of the note, does not reach or limit the general terms of the swearing as to the time of payment. Nor does the general averment that Weathers had not paid the money at any time before he gave this evidence, show that a question as to a payment at any time was material. It may be considered as showing that Weathers has certainly sworn falsely, but it does not reach the materiality of the facts sworn to, so as to show that a perjury had been committed.

There are other errors assigned that would demand our attention, if the one already examined did not show, conclusively, that the indictment is materially defective, and that the judgment must be wholly reversed.

 Pegg v. Davis.

Per Curiam.—The judgment is reversed. To be certified &c.

Stevens, for the plaintiff.

Wick, for the state.

 PEGG v. DAVIS.

PLEADINGS—EQUITY—EXCEPTIONS AND ANSWERS.—If exceptions be taken to some parts of an answer in chancery, and the Court consider the exceptions valid, the defendant may be ordered to answer over so far as the exceptions extend, but he can not be required to answer over generally.

SAME.—If the answer to any particular charge in a bill be not sufficiently explicit, the complainant should file exceptions to that part of the answer; but if instead of doing that, he acquiesce in the answer, the charge must be proved or it will be disallowed.

EQUITY PRACTICE—FORMATION OF ISSUES.—If any particular claim in a bill be not answered, the complainant should insist on an answer, and if such answer be refused, he may take a decree *pro tanto* by confession; and then, if the charge is sufficiently explicit, it may be recovered without further proof. But should the complainant, instead of pursuing that course, bring the case to a hearing on the merits, he can only entitle himself to the claim by proving it.

SAME—DEED PRO CONFESSO.—If the charge in a bill be not stated with sufficient certainty, the complainant can not, even after a decree *pro confesso*, have a final decree, unless he establish his demand by satisfactory evidence (a).

[*282] *ERROR to the Franklin Circuit Court.

BLACKFORD, J.—In October, 1822, Pegg filed a bill in chancery in the Franklin Circuit Court against Davis; and, in October, 1823, he filed an amended bill. By these bills it appears that the complainant and defendant had been partners in business at Brookville, as merchants and manufacturers. It is also shown that they had made a final settlement of their partnership concerns, and had dissolved their partnership. The object of the suit was, among other things, that the settlement of the partner-

(a) 4 Ind. 149.

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ship accounts should be opened, in consequence of fraud; and that Davis should be compelled to account for partnership funds, fraudulently applied by him to his own use. In January, 1824, Davis filed his answer; and, in February following, he filed a cross-bill. In May, 1824, Pegg, the complainant in the original bill, filed his answer to the cross-bill. In July and August, 1824, several depositions were taken in the cause. In September following, Davis filed an amended cross-bill; which was answered by Pegg. The latter also filed a supplemental bill; which, in March, 1825, was answered by Davis. At the March term, 1825, Davis filed exceptions to Pegg's answers to the cross-bill and amended cross-bill. And the Court, during the same term, made the following order: "On motion, the defendant, John Pegg, is ruled to answer over to complainant's cross-bill in 90 days, or decree to be entered thereon at the next term of this Court." The next proceeding in this cause was the following order of reference, made at the September term, 1825: "On motion, this cause is referred to the master in chancery for a settlement of accounts between the said parties; who is required to report to the next term of this Court." At the September term, 1826, the master reported that there was a balance due to Davis, the defendant in the original suit, of 2,958 dollars. During the same term, no objection being made to the report, and the bills, answers, depositions, and exhibits, in the cause, having been examined by the Court, there was a final decree made that Davis recover the said sum of 2,958 dollars, found and reported by the master in manner aforesaid, together with costs.

Pegg, the complainant below in the original suit, appeals to this Court.

The general order, made by the Circuit Court at the [283] March *term, 1825, that Pegg should answer over to the cross-bill of Davis, was incorrect. There are material parts of Pegg's answer to the cross-bill, to which Davis took no exception. Supposing, therefore,

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that all the exceptions are valid, it is clear that Pegg could not be required to answer over to the whole bill, but only so far as the exceptions to his answer extended. It is not necessary, however, to dwell upon this part of the case. This irregular order produced no injury to Pegg, the plaintiff in error, of which he can complain. No effort was made to enforce it. It remained a dead letter, not noticed either by the parties or by the Court. Davis may be considered as having abandoned the order, together with the exceptions which it was intended to sustain. We shall consider the case, therefore, as if there had been no order upon Pegg to answer over, nor any exceptions to his answer.

The master's report contains a long statement of the accounts between the parties. The two principal charges allowed by the master against Pegg are, one of 2,000 dollars, the other of 800 dollars. The following is a copy of the entry of these charges in the master's report: "To this amount of cash notes on hand, at the time of the dissolution of the partnership, which he, Pegg, is charged with having secreted; and his answer appears to be vague and uncertain—2,000 dollars. To this amount in cash on hand, at the time of the dissolution of the partnership; to which the answer is vague and uncertain—800 dollars." The record contains no proof of either of those charges. They were allowed by the master, as he himself particularly states, merely because they are contained in the bill, and the answer to them is vague and uncertain.

The statement in the amended cross-bill—and it appears nowhere else—as to the charge of 2,000 dollars, is as follows: "At the time of the dissolution of the said partnership, as your orator is informed and believes, the said John Pegg had cash notes to a large amount, say, 2,000 dollars, on divers individuals, payable to the said firm of Pegg and Davis; and which had been given by said persons on contract to the use of said firm: which said notes the said Pegg at that time secreted and kept back, and has

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never to this day accounted to your orator for the same.

Some of which said notes, the said Pegg afterwards assigned to third persons on his own *individual contracts." The answer of Pegg to this charge is as follows: "This defendant says, that if, at the dissolution aforesaid, there were cash notes on hand belonging to the firm, they were honestly applied, so far as this defendant was concerned, to the payment of partnership debts; not a cent of which was ever applied to his own individual use without accounting therefor." In this answer of Pegg, there is certainly no admission of his ever having had any part of the 2,000 dollars in cash notes, with which he is charged, and he positively denies the appropriation of any of them to his own use as stated in the bill. There is nothing, therefore, in the answer to warrant the allowance of this charge of 2,000 dollars. If the answer is not sufficiently explicit, Davis should have insisted upon his exceptions to it. That, however, as we have already shown, he failed to do. By acquiescing in the answer, he rested the fate of this charge upon the proof he might be able to adduce. But he produced no evidence to support it, and consequently, had no right to the allowance.

The other item of 800 dollars is charged in the amended cross-bill as follows: "At the time the said partnership was dissolved as aforesaid, the said plaintiff had on hand a large sum of money, as your orator is informed and believes, belonging to said firm, which he fails to account for, or pay over to your orator." To this claim of 800 dollars, the answer contains no particular notice. Whether, on account of the generality of the charge—no particular sum being mentioned—Pegg was authorized to pass it over in silence, is not now the question. It was the business of Davis, to insist upon an answer to this part of his bill, if he had a right to it; and, if the answer were refused, to take a decree *pro tanto* by confession. Then, if the charge is sufficiently explicit, he might have

recovered it without the production of proof. That course, however, was not pursued. The case was brought to a hearing on the merits; and Davis could entitle himself to this charge of 800 dollars in no other way than by proving it. That he failed to do; and the allowance, therefore, should not have been made.

There is another view which may be taken of this subject. Admitting the order of the Court, requiring Pegg to answer over generally, to be correct; and supposing that, for the want of such answer, there had been [*285] a decree against him, *pro confesso*; *even under those circumstances, Davis could not have recovered, without proof, either the charge of 2,000 dollars, or that of 800 dollars. The reason is, there is too much uncertainty in the statement of these charges in the bill. The first is, "of cash notes to a large amount, say 2,000 dollars." Here, by the insertion of the word *say*, the amount is rendered altogether uncertain. The second is, "of a large sum of money;" without the slightest reference to any definite amount. In such cases of uncertainty as to the allegations in a bill, the complainant, even after a decree *pro confesso*, can have no right to a final decree unless he establish his demands by satisfactory evidence. This doctrine was lately examined by the Court of chancery in New York, and may be considered as settled. *Williams v. Corwin*, 1 Hopkins' Rep. 471 (1).

From these considerations we are perfectly satisfied that the decree in this case is incorrect, as regards the two principal items of the account allowed against Pegg. It was a great mistake to suppose that Davis could be entitled to them, independently of any evidence, merely because, in the language of the master, the answer respecting them was vague and uncertain.

It is not necessary that we should examine any further into the merits of this decree. It is evidently erroneous, and must be reversed. It has also been shown that the order requiring a new answer generally to the cross-bill

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was incorrectly made: that order, therefore, with the subsequent proceedings, must be likewise set aside. The cause must be remanded to the Circuit Court for further proceedings, with directions to permit the parties to amend their bills, answers, &c., and to take further evidence, if they think proper.

Per Curiam.—The decree is reversed, &c. Cause remanded, &c.

Lane and Fox, for the plaintiff.

Morris, for the defendant.

(1) "When the allegations of a bill are distinct and positive, and the bill is confessed, such allegations are taken as true, without proof. Where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs." *Per* SANFORD, Chancellor, in *Williams v. Corwin*, cited in the text. *Vide Platt et al. v. Judson*, May term, 1833, post.

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*GORDON v. SPENCER.

CONTINUANCE—PRACTICE—ABSENT WITNESS.—If the continuance of a cause be applied for, on the ground that a witness who had been subpoenaed does not attend, the return of the sheriff must be produced.

SAME.—An affidavit for a continuance, on account of the absence of witnesses, must clearly show their materiality.

SLANDER—EVIDENCE.—A plaintiff in slander, having first proved that the defendant had spoken to third persons the words laid in the declaration, may prove, in support of the declaration, that the defendant had spoken the same words in answer to the plaintiff's interrogatories.

APPEAL from the Franklin Circuit Court.

HOLMAN, J.—Alma Spencer obtained a verdict and judgment against James Gordon in an action of slander. During the progress of the cause the defendant, now the appellant, took two bills of exceptions, and has appealed to this Court for a reversal of the judgment.

The first bill of exceptions states that the defendant applied to the Circuit Court for a continuance of the cause, on account of the absence of four witnesses; stat-

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ing in an affidavit that one of them, who resided in this state, had been subpœnaed in his behalf, as he was informed by the sheriff; that the other three lived in the state of Ohio, Butler county; that he expected to be able to procure their testimony by the next term of that Court, either by deposition or otherwise, and support the matters alleged in his plea of defence, and prove the bad character of the said Alma Spencer, if this cause should be continued; and that he knew of no other persons by whom he could prove the same facts. To counteract the effect of this affidavit, the plaintiff introduced the affidavit of a third person, which was received and read by the Circuit Court. The Circuit Court, on hearing these affidavits, refused to continue the cause. We deem it unnecessary to notice the counter affidavit introduced by the plaintiff, inasmuch as we are of opinion that the defendant's affidavit does not show, conclusively, that the Circuit Court transcended the bounds of a legal discretion in refusing a continuance of the cause. Without minutely criticising this affidavit, we see two points of uncertainty in it. The first is as to the summoning of the resident witness. The sheriff's information was not

[*287] the best evidence in this matter to which the *defendant might have referred. The sheriff's official return to the subpœna was preferable. The second is, that the defendant does not state conclusively that he expects to prove anything by any of these witnesses; but that, if the cause should be continued, he expected to procure their testimony either by deposition or otherwise, and support the matters alleged in his plea, and prove the bad character of the plaintiff. Passing the vagueness of what he expected to prove, he does not say, positively, that he expected to prove this by these witnesses or any of them; nor will the statement that he knew of no other persons by whom he could prove the same facts, entirely remove this uncertainty. When an application is made to this Court to reverse a judgment, on account of an

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abuse of legal discretion by the Circuit Court, a case must be made out that shows, unequivocally, that the Circuit Court has abused its discretionary powers. So that we can not say that the Circuit Court erred in refusing a continuance (1).

The second bill of exceptions is as follows: "The plaintiff offered in evidence to the jury words spoken by the defendant on interrogatories (of the plaintiff,) to support the words laid in the declaration, (the words as set out in the declaration being proved by other witnesses;) to the admission of which, as evidence to the jury to support the words laid in the declaration, the defendant by his counsel objects, and moves the Court to charge the jury, that words spoken by the defendant of the plaintiff, on interrogatories, could not be received as evidence to support the words laid in the declaration; which said objection and motion of the defendant were, by the Court, overruled, and the evidence aforesaid was permitted to go to the jury, in support of the words charged in the declaration; to which decision and judgment of the court, the defendant by his counsel excepts." The appellant by his counsel contends with much earnestness, that the Circuit Court erred in the admission of his testimony. He relies, in support of this position, principally, on the case of *King v. Waring*, 5 Esp. R. 13, and *Smith v. Wood*, 3 Campb. 323. In *King v. Waring*, Lord ALVANLEY decided, that "though a letter giving a false character of a servant might be the ground of an action, yet if written as an answer to a letter sent, not with a view of obtaining a character, but with an intention to procure an answer, [*288] upon which to ground *an action for a libel, such evidence ought not to be admitted. In *Smith v. Wood*, which was an action for libel upon the plaintiff in the shape of a caricature print, entitled, "The inside of a parish work-house with all abuses reformed," a witness stated that, having heard that defendant had a copy of this print, he went to his house and requested liberty to

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see it ; and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed. Lord ELLENBOROUGH ruled, that this was not sufficient evidence of publication to support the action. Starkie, in his treatise on evidence, annexes a quære to this case ; because it does not appear that the witness had been sent by the plaintiff. 2 Stark. Ev. 877. These cases, together with some insinuations in the case of *Rogers v. Clifton*, 3 Bos. & Pull, 587, though less strong than the foregoing, may be considered as supporting the doctrine laid down in Starkie on Slander, 169, and 2 Stark. Ev. 876, viz : that where the plaintiff, knowing the defendant's sentiments, procures the publication for the purposes of the action, he can not afterwards be heard to complain of that as an injury, which he has voluntarily occasioned.

Taking this to be the law upon this subject, still we are of opinion that the bill of exceptions does not show, that the Circuit Court erred in the admission of this testimony, or in the refusal of these instructions. If the plaintiff, hearing that the defendant had uttered the slander to others, should inquire of the defendant as to the truth of the report, and the defendant should repeat the slander, the fact that he spoke the slanderous words in answer to the plaintiff's interrogatories in the last instance, would not destroy the plaintiff's right of action. And after the plaintiff had proved the first speaking of the words, we know of no rule that would prevent him from proving, that the same words were afterwards repeated in answer to his interrogatories. In this case, the words laid in the declaration were first proved, (says the bill of exceptions,) by other witnesses, before the evidence relative to the words spoken in answer to interrogatories was introduced ; and there is not enough in the bill of exceptions to show that the evidence objected to was inadmissible. To make this a case, in which we could determine as to the admissibility of the words spoken in answer to interrogatories, it should appear what the interrogatories

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[*289] *were, what induced them, what the words thus spoken were, and how far they varied the case from what it would otherwise have been. The refusal of the Circuit Court to give the instructions required, amounts to no more than the admission of the testimony, and its correctness can only be tested by the precise state of the case. We have seen neither principle nor precedent, that would authorize us to say, in general terms, that words spoken by a defendant in answer to interrogatories of a plaintiff, can in no case be given in evidence to support the words laid in the declaration, where the words laid in the declaration have been previously proved by other witnesses.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

Wick, Morris, Starr, and Caswell, for the appellant.

M'Kinney and Smith, for the appellee.

(1) The principal facts, expected to be proved by the absent witness, must be stated in the affidavit, in order that the Court may judge of the materiality of the witness. Stat. 1833, p. 115.

THE STATE v. STUCKY, in Error.

AN indictment for retailing spirituous liquors to *divers persons* without license, is bad. It should either contain the names of the persons to whom the sale was made, or state their names to be unknown. 1 Chitt. C. L. 211.

SHELBY, Administratrix, v. THE GOVERNOR, for the use of
NEWMAN.

ADMISSIONS OF PRINCIPAL—LIABILITY OF SURETY.—A sheriff's acknowledgment that he had collected money on an order of sale, can not be proved to sustain an action for the money on the plaintiff's surety unless the acknowledgment was made whilst the sheriff was acting officially in relation to the receipt of the money (a).

(a) 15 Ind. 64.

Shelby, Administratrix, v. The Governor, for the use of Newman.

ERROR to the Clark Circuit Court.—For the cause of action and the defence in this case, see *The Governor v. Shelby*, ante, p. 26.

[*290] HOLMAN, J.—On the trial, the plaintiff introduced a witness to prove that Weathers told him that he had collected the money in controversy. To the admission of which testimony the defendant objected, but the Court were divided on the question and the testimony went to the jury; to which the defendant excepted. The plaintiff had a verdict and judgment, which judgment the defendant seeks to reverse by writ of error. Agreeably to the decision in the case of *Hotchkiss v. Lyon and Others*, May term, 1829 (1), and the cases there cited, the admissions or declarations of a principal are not evidence against a surety, unless such admissions or declarations form a part of the transaction in which the principal, as such, is engaged. If Weathers, while officially acting in relation to the receipt of this money, stated that he had received it, such statement would form a part of the *res gestæ*, and would be evidence to prove the act of receiving; and would therefore be admissible against his sureties. But declarations made by him at any subsequent period, would have no connection with the act, and could not be introduced as evidence of the act, so as to bind his sureties; for it is his acts and not his admissions or declarations, for which his sureties are bound. As the statement of Weathers, that he had collected this money, is not connected by the testimony, with any act of his relative to this order of sale, or any money collected by him on this order, it was inadmissible as evidence against the defendant in this case.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Hawk and Dewey, for the plaintiff.

Thompson, for the defendant.

(1) Ante, p. 222.

O'Brien and Others, Executors, v. Daniel and Others.

O'BRIEN and Others, Executors, v. DANIEL and Others.

ATTACHMENT—AFFIDAVIT—PLEADING.—An Affidavit in attachment can not be objected to for not describing the nature of the debt, if the same be described in a declaration filed in the cause.

SAME—VENUE.—The affidavit, in the case of a domestic attachment, must state the county in which the debtor had recently resided (*a*).

[*291] *ERROR to the Posey Circuit Court.

HOLMAN, J.—Domestic attachment on the following affidavit:—"State of Indiana, Posey county, ss: I, Richard Daniel, of the county aforesaid, do solemnly swear that John J. O'Brien, James J. O'Brien and Michael O'Byrns, executors of the last will and testament of Thomas Jones, deceased, are justly indebted to me, the said Richard Daniel, in the sum of 150 dollars; and that the said John J. O'Brien, James J. O'Brien and Michael O'Byrns, so concealed themselves that the ordinary process of law can not be served upon them.—R. Daniel." Endorsed, sworn to, &c. A number of creditors filed their claims under this attachment, and proceeding were had to final judgment. Among a variety of errors assigned for reversing these proceedings, two exceptions are taken to the affidavit. One is, that the affidavit does not specify the nature of the debt on which the attachment is founded: but as a declaration was afterwards filed by Daniel, specifying the nature, &c. of his debt, this defect is removed. The other is, that the affidavit does not state that the debtors were late of the said county, as required by the act of assembly, or of any other county in this state. This exception is well taken. The act of assembly requires the affidavit to state the late residence of the debtors. R. C. 1824, p. 61 (1). From anything in this affidavit, the debtors may have been non-residents, and not subject to a domestic attachment. The *ex parte*

(a) 9 Ind. 367.

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nature of these proceedings requires a strict compliance with every statutory requisition.

Per Curiam.—The judgment is reversed with costs. To be certified, &c.

Howk, for the plaintiffs.

Hall, for the defendants.

(1) Accord. R. C. 1831, p. 75.

SWAN v. RARY.

PRACTICE—ISSUES AND TRIAL.—The issues must be made up before the jury are sworn, excepting only that a *similitor* may be dispensed with.

SAME—FILING OF PLEADINGS.—An affidavit by the plaintiff's [*292] attorney, that he had left the replication on the clerk's *table with the papers in the cause, and that it had afterwards come into the deponent's possession by mistake, does not show, with sufficient certainty, that the replication had been properly filed.

APPEAL from the Parke Circuit Court.

BLACKFORD, J.—This was an action of slander by Rary against Swan. The defendant pleaded not guilty and a justification. Verdict for the plaintiff below. A motion was made by the defendant below in arrest of judgment, because there was no replication to his special plea. It appeared that after the verdict had been received the replication to the special plea was in possession of Rary's attorney, and had not been filed, unless the following facts shown by that attorney's affidavit, amounted to a filing, viz., that he had left the replication on the clerk's table with the papers in the cause, and that it had afterwards come into the attorney's possession by mistake. The Circuit Court overruled the motion in arrest of judgment, and rendered judgment on the verdict.

It is not disputed but that it was necessary to file the replication previously to the trial. The issues must be made up before the jury are sworn; excepting only, as

Glass v. Doe, on the Demise of Murphy, on Appeal.

we have heretofore decided, that the *similiter* may be dispensed with. *Jared v. Goodtitle*, Nov. term, 1818 (1). The only question in this case is, was the replication properly filed? Our opinion is that the record does not show that it was. It is not stated by the affidavit that the replication was ever in the hands of the clerk. After the trial it was found to be, by mistake, in the possession of the plaintiff's attorney. The circumstance of its having been once left on the clerk's table, by the attorney, is not, under the circumstances of the case, sufficient evidence that it had been properly filed. The motion in arrest of judgment should have been sustained.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

Dewey and Kinney, for the appellant.

Cone, for the appellee.

(1) Vol. 1, of these Rep. 29. It is held, in a late case, that even the omission to add the *similiter* is an irregularity for which a verdict will be set aside. *Griffith v. Crockford*, 3 Brod. & Bing. 1. But there are several cases to the contrary. Vide note to *Jared v. Goodtitle*, cited in the text.

[*293] GLASS v. DOE, on the Demise of MURPHY, on Appeal.

INFANTS—RIGHT TO BE MADE PARTIES.

AN infant, having a title to land for which an action of ejectment is brought, has a right to be admitted a defendant on the usual terms; and the Court should appoint a guardian for him, in order that he may be enabled to defend the suit.

WHEELER and Another v. EMERSON, on Appeal.

ONE of two defendants in chancery can not be examined as a witness by the complainant, without a special order of the Court.

Long, v. Long, on Appeal.

LONG v. LONG, on Appeal.

EVIDENCE—VARIANCE.

DEBT on a writing obligatory for the payment of *one hundred and twenty dollars*. The declaration set forth the sum in words as above. The note, when produced on oyer, showed a promise to pay \$120; the sum being expressed in figures. *Held*, that the variance was immaterial.

Plea, in this case, that the obligation had been given to the plaintiff in part payment of a tract of land purchased of him by the defendant, which land had been previously devised to the plaintiff; that the plaintiff knew of the will, and had had it under his control for three years next ensuing the testator's death, but had not, within that time, caused the same to be proved and recorded. *Held*, on demurrer, that the plea was insufficient.

END OF NOVEMBER TERM, 1829.

[*294]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1830, IN THE FOURTEENTH YEAR OF THE
STATE.

COOPER *v.* ADAMS and Another, in Error.

ARREST—JUSTIFICATION—AFFIDAVIT AND WARRANT.

TO an action for false imprisonment against a justice of the peace and a constable, the defendants pleaded in justification that an affidavit had been made before the justice, charging the plaintiff with having violently assaulted, beaten and wounded the deponent, wherefore the justice had issued his warrant, &c. *Held*, that the plea was not objectionable, after a verdict in favor of the defendants, for not showing that the assault and battery were charged to have been *unlawfully* made.

The arresting of an offender and the retaking of him on fresh pursuit after an escape constitute but one effective arrest.

The warrant of a justice of the peace, on a charge of an assault and battery, commenced as follows: "The state of Indiana, Allen county, ss: To William Brown, constable of Adams township, greeting:" *Held*, that no ob-

Frakes v. Brown.

jection could be made to the warrant, on account of its not repeating, in the mandatory part of it, the name of the state.

A person arrested on a justice's warrant for a breach of the peace can not maintain an action of false [*295] imprisonment against *the justice or constable, in consequence of a mere informality in the warrant, provided the justice have jurisdiction.

It is always presumed by this Court, that all the evidence necessary to sustain the verdict was given to the jury, unless the contrary be shown by the record.

FRAKES v BROWN.

ALIMONY—JUDGMENT LIEN.—If a wife obtain a decree for a divorce and for a certain sum as alimony, the decree for the alimony is a lien on the real estate of the husband.

JUDICIAL SALE—REVERSAL OF JUDGMENT.—The reversal of a judgment on error, after a sale of land under it on execution, does not affect the purchaser's title.

SHERIFF—FIERI FACIAS.—A fieri facias, by statute, expressly commands the sheriff to make the money of the goods and chattles, lands and tenements, of the debtor.

JUDICIAL SALE—PERSONAL AND REAL PROPERTY.—A purchaser of land at Sheriff's sale, is not obliged to show that the debtor had not personal property to satisfy the judgment. It is only necessary for him to show the judgment of a competent Court, and the kind of execution which authorizes the sheriff to sell. He has a right to presume that all the intermediate proceedings are correct.

FRAUDULENT CONVEYANCE AGAINST WIFE.—A wife has a lawful claim upon her husband for her maintenance; and if, during the pendency of her petition for a divorce and alimony, a conveyance of his land be executed by the husband in order to defraud his wife of her right to a support, and be received by the grantee with the same fraudulent design, the conveyance as to her is void.

INJUNCTION—SALE CONTRARY TO ORDER OF COURT—NOTICE.—During the pendency of a petition for a divorce and alimony, the Court may make an order on the defendant requiring him not to dispose of any of his real or personal property; but the purchaser of real estate from the defendant will not be affected by the order, unless he have actual notice of its

Frakes v. Brown.

existence; the pendency of the suit and entry of the order, not being sufficient of themselves to avoid the conveyance (a).

FRAUDULENT CONVEYANCE—BY WHOM SET ASIDE.—A deed, fraudulent as to a judgment-creditor, may be set aside at the suit of the purchaser at sheriff's sale under the judgment (b).

SAME—FRAUD OF GRANTEE.—To render a deed fraudulent and void as to creditors, there must be fraud in the grantee as well as in the grantor (c).

SAME—REMEDY AFTER JUDICIAL SALE.—The purchaser of real estate at sheriff's sale may obtain a decree setting aside a deed which had been made to defraud the judgment-creditor, and securing the purchaser's title against any claims under the fraudulent deed; but the decree can not vest the absolute fee in the complainant.

APPEAL from the Decatur Circuit Court.

BLACKFORD, J.—This was a bill in chancery, in which Brown, the complainant, prays that conveyance of a tract of land, made by Reuben Jones to the defendant, may be set aside as fraudulent and void.

The bill states, that, at the September term, [*296] 1825, of the *Decatur Circuit Court, Martha Jones filed a petition against her husband, Reuben Jones, for a divorce and alimony; that, during the same term, the Court made an order upon the defendant not to dispose of his property until the suit should be determined; that, at the March term, 1826, the petitioner obtained a divorce, and a judgment for the sum of 550 dollars as alimony; that, by virtue of a fieri facias, issued upon this judgment, the land in question was sold in November, 1826, and the complainant was the purchaser. The bill further states, that, during the pendency of the suit for a divorce, viz., in November, 1825, the said land was conveyed fraudulently and without consideration, by Jones to Frakes, to avoid the consequences of Mrs. Jones' suit. Both the parties to the deed are charged by the bill with notice of the pendency of the suit, and with fraud.

A demurrer and plea to the bill were filed; but these may be considered as overruled by the answer, which covers the whole case. The defendant, in his answer, in-

(a) 8 Ind. 427. (b) 35 Ind. 483. (c) 16 Ind. 172; 20 *Id.* 297.

sists that he is a *bona fide* purchaser for a valuable consideration; denies all fraud; and avers that he had no knowledge of the order of the Court, nor of the pendency of the suit referred to in the bill.

The material facts in this case are as follows: A short time before the sitting of the Circuit Court in Decatur county, in September, 1825, Reuben Jones and his wife had a dispute and separated. At that term of the Court Mrs. Jones filed a petition for a divorce and alimony; and obtained an order against her husband, restraining him from disposing of his property until the cause should be decided. At the March term, 1826, the petitioner obtained a divorce, and a judgment for the sum of 550 dollars as alimony. Upon this judgment an execution of fieri facias issued, and was levied upon the land in dispute as the property of Jones. The complainant purchased it in November, 1826, at the sheriff's sale.

During the pendency of this suit for a divorce, and subsequently to the restraining order, viz., about the 1st of October, 1825, Jones, the husband, executed a bill of sale to Frakes, the defendant in the present suit, for the whole of his personal property, except a few small articles which he sold to others. The property thus sold to Frakes, consisted of horses, cattle, hogs, sheep, corn and beds.

[*297] Jones stated at the time of this sale *that he was putting his property out of his hands to prevent his wife from getting any of it. About the same time, Jones took his children to Frakes' house to be taken care of, and went himself not long afterwards to the county of Ripley, and resided with Frakes' son. Frakes, having sold a considerable part of this property, and received the money for it, went into Ripley county to see Jones, who had then been there eight or ten days. On the evening of his arrival, he told Jones that he had brought him the money to pay for the land; and, the next morning, he and Jones went together to Versailles. There, the conveyance of Jones' land to Frakes, charged in the bill to

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be fraudulent, was written at their request by the clerk of the Court. At this time, Frakes, in presence of the clerk, paid Jones about 40 dollars, and gave him a note for some amount besides. This conveyance is dated the 21st of November, 1825. Immediately after this transaction Frakes returned to his home in Decatur county; and, in the latter part of December following Jones also returned to that county.

At the time of the separation of Jones and his wife, Jones and Frakes resided in the same neighborhood. Their circumstances were moderate. Frakes owned 80 acres of land and some personal property; but he was not able to buy any more land without first selling his own.

Some time after these things had taken place, Nathan Crume, the son-in-law of Frakes, heard both Jones and Frakes say, at different times, that all the buying and selling between them was for the purpose of preventing Mrs. Jones and her lawyers from getting any of her husband's property. He also heard Frakes say that he received the money from Jones and paid it back to him for the land in the presence of the clerk of Ripley county. Both Nathan Crume and his wife, the daughter of Frakes, heard Jones tell Frakes that he wished him, when he sold the land, to pay Joseph Jones his money; and that the balance he, Reuben Jones, would put in his pocket and go away. To which Frakes replied by saying—yes. They also heard Frakes say that were it not for his daughter Betsy he would give up the property to Jones.

There is a great deal of evidence as to whether Jones and Frakes, at the time when the land was conveyed,

knew of the pendency of the suit for the divorce, [*298] and of the restraining *order mentioned in the bill. Taking all the depositions on the subject together, we are satisfied that they both knew, at that time, that there were some proceedings depending in Court against Jones at the suit of his wife, in consequence of his ill-treatment of her, which might affect his prop-

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erty. But, at the same time, there is no sufficient proof that they knew what was the precise nature of those proceedings, or that the Court had made the order alluded to.

The case was submitted to the Circuit Court upon bill, answer and depositions. That Court set aside the deed from Jones to Frakes as fraudulent; and decreed that Brown was the owner in fee-simple of the land, and that he should forever be quieted in his title acquired under the sheriff's sale. Frakes and all claimants under him were also perpetually enjoined from disturbing Brown's possession of the premises. From that decree the defendant has appealed to this Court.

The first objection to the complainant's claim is, that the sheriff had no authority to sell the land, admitting it to have belonged to Jones. It is said that real estate is not liable on a decree for a divorce and alimony. The answer to this is, that here is a judgment against Jones for a certain sum of money, rendered by a Court having jurisdiction of the cause; and that every judgment of this kind is, by statute, a lien on real estate. It is not for this Court to look beyond the judgment in the case before us. It must be considered as having the same effect as all other judgments for the payment of money, whilst it stands unreversed and remains unsatisfied. Indeed, were the judgment erroneous, and had it been reversed since the sheriff's sale, that circumstance would not affect the purchaser's title. *Manning's case*, 8 Co. Rep. 187; R. C. 1824, p. 195. It is also said that an execution of fieri facias, on which this land was sold, does not authorize a sale of real property. This is certainly a mistake. The writ denominated by us a fieri facias is an execution expressly commanding the sheriff to make the money of the goods and chattels, lands and tenements, of the debtor. It is also said that it should appear that Jones had not personal property to satisfy the judgment. This is not necessary. A purchaser at sheriff's sale is only obliged

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to show the judgment of a competent Court and the kind of execution that authorizes the sheriff to sell. [*299] He has a right to presume that *all the intermediate proceedings are correct. *Armstrong v. Jackson*, Nov. term, 1822 (1). There are no grounds, therefore, for the first objection made by the appellant.

The other objection to the complainant's right under the sheriff's deed is, that at the time the judgment was rendered, the land did not belong to Jones; the appellant having previously purchased it of him, *bona fide*, and for a valuable consideration. That the purchase was made by Frakes, previously to the judgment, is admitted by the bill; but that purchase, the complaint contends, was made to defraud Mrs. Jones, and was consequently void. The petitioner for the divorce, as the wife of Jones, had a lawful claim upon him for her maintenance; and if the conveyance was made by Jones and received by Frakes, with the intention of cheating Mrs. Jones out of her right to a support, it was certainly void by the statute of 1824, against fraudulent conveyances.

The first ground relied upon to show the conveyance void as to Mrs. Jones, is, that it was made pending her suit, and subsequently to the restraining order. We do not agree with the appellant, that such an order can not extend to real estate; on the contrary, we conceive it may by virtue of the statute of 1824, p. 157. But, at the same time, in order to render it obligatory, there should be actual notice of its existence. The mere pendency of the suit, and the entry of the order, are not of themselves sufficient to avoid the conveyance. In the record before us, there is no satisfactory proof that the proceedings in Court against Jones were known to him and Frakes, when the deed was executed; and the case must consequently be decided without any reference to those proceedings.

The other ground insisted upon against this conveyance is, that there is sufficient evidence to show it fraudulent,

independently of the pendency of the suit for a divorce. Upon this point, we entirely agree with the complainant. The parties to the conveyance resided in the same neighborhood, and were in moderate circumstances. Frakes knew that Jones and his wife had recently had a dispute and had separated; and he was bound to know that Mrs. Jones had a lawful claim against her husband for maintenance. Under these circumstances, and without being able in the opinion of his neighbors, to purchase any real estate in addition to the small tract on which [300] *he lived, Frakes suddenly buys the whole of Jones' personal property, with a trifling exception, and, shortly afterwards, his land also. It is in proof too, that when Jones thus transferred his personal property, he stated his object to be to prevent his wife from getting any of it. If the case stopped here, we should be inclined to set aside the deed from Jones to Frakes as fraudulent and void as to Mrs. Jones, and as to the complainant also who is a purchaser under her judgment. We should be disposed to set it aside, not for Jones' fraud alone—that of itself would be insufficient—but because Frakes might be viewed as the fraudulent assistant of Jones in the attempt to cheat his wife out of her maintenance.

In fixing upon Frakes, at this stage of the cause, the character of a fraudulent purchaser, we should decide against him from circumstances merely; and not from any positive evidence of his fraud. The case, however, does not rest here. There is positive evidence that Frakes is not a purchaser for a valuable consideration, nor *bona fide*. The depositions of his son-in-law, and his own daughter, are perfectly satisfactory to the Court, that he received the conveyance for the land in question, without any real consideration; that the object of both Frakes and Jones was to secure the property from Mrs. Jones' claims; and that there existed a trust between them, according to which the property was, at some future period,

Taylor v. Owen and Others.

to be re-conveyed to Jones, or its proceeds paid to him. An attempt was made to impeach the testimony of the son-in-law, but, we think, without success. His evidence is confirmed by that of his wife, and corroborated by a variety of circumstances.

We have now taken a general view of this case, and have come to the conclusion that the appellant's objections to the sheriff's sale to Brown, the complainant, can not be supported; and that the deed from Jones to the appellant is fraudulent and void. The decree of the Circuit Court, therefore, so far as it relates to the setting aside of the deed from Jones to Frakes, and the quieting of the title of Brown against any claims under that deed, and as it relates to the costs, must be affirmed. The other part of the decree, which adjudges that Brown is the owner in fee-simple of the premises, must be reversed.

Per Curiam.—The decree so far as it relates, &c. is affirmed. The other part, &c. is reversed. To be certified, &c.

[*301] **M'Kinney* and *Test*, for the appellant.
 Wick, for the appellee.

(1) Vol. 1 of these Rep. 210.

TAYLOR v. OWEN and Others.

COVENANTS RUNNING WITH LAND—LEASE.—A. being the owner in fee of a town, leased one of the houses to B. for a term of years, and covenanted in the lease, that B. should have the exclusive privilege of vending merchandise in the town during the term. Soon after the commencement of that term A. leased another house in the town to C. for a term of years without any restriction as to the vending of merchandise; C. under-let a part of this house to D. without restriction; and D. commenced the sale of merchandise on the premises so leased to him. D., before the date of his lease, had notice of A.'s covenant with B., and C. had notice of the same before D.'s sale had commenced. *Held*, that D. was not, under

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these circumstances, prohibited from vending merchandise in the part of the house which had been leased to him by C (a).

SAME.—The right of the owner of real estate to carry on trade there to the exclusion of all others, can not be made the subject of a separate conveyance, so as to prevent a subsequent holder of the property, without his own agreement, from pursuing his lawful business there.

SAME.—Such covenants as the above-mentioned, of A. with B., are merely of a personal nature. They neither run with the land of the covenantor, nor create any lien thereon either legal or equitable.

SAME—BONA FIDE VENDEE.—A *bona fide* vendee or lessee of real estate, is not affected by such a personal covenant; and the circumstance of his having had notice of it makes no difference.

SAME—LESSEE—SUB-LESSEE.—The under lessee of real estate has a right to pursue thereon any lawful business he chooses, which is not prohibited by the lease to his lessor nor by that to himself; and which is not injurious to the premises.

SAME—BREACH.—A., by his unrestricted lease to C., above-mentioned, broke his covenant with B.; and he is liable for the breach to B., if the covenant be valid, in an action at law.

ERROR to the Gibson Circuit Court.

BLACKFORD, J.—This was a suit in chancery. The complainant, Taylor, was a merchant in New Harmony, and claimed the exclusive right to vend merchandise in that town for ten years. He complains in his bill that he had been interrupted in the enjoyment of this exclusive privilege by the defendants, Owen, Rogers, and Moffatt; and prays an injunction. The defendants, in their answers, deny the existence of the right claimed by the complainant. The facts in the case, necessary to be noticed, are as follows:

Owen, one of the defendants, being the owner [*302] in fee simple *of the town of New Harmony, and having a mercantile establishment there, sold the whole of his merchandise to the complainant, leased him the buildings in which the business had been carried on, and agreed in the lease that he should have the exclusive right of keeping a store in the town for ten years. The complainant agreed, on his part, to pay for the merchandise within a certain time; and also to pay a certain sum

Taylor v. Owen and Others.

for the privilege contracted for, and as a rent for the buildings. After the complainant had taken possession, and had been trading there free from competition for several months, Owen leased another house and lot in the town for three years to Rogers, one of the other defendants, without any restriction as to trade, except that he should not sell spirituous liquors. Rogers afterwards under-let a part of this house to Moffatt, the other defendant, free from any restriction; and Moffatt commenced the vending of merchandise there. Previously to the date of his lease, Moffatt had notice of the contract between Owen and the complainant; and Rogers had notice of it also, before Moffatt offered his goods for sale. In the course of the proceedings, some depositions were suppressed upon proof of the deponents being interested; and a motion for a continuance and to take further depositions was overruled; the Court not being informed what was intended to be proved.

The Circuit Court dismissed the bill.

The object of this bill is to obtain a perpetual injunction against Moffatt, restraining him from the further vending of merchandise in New Harmony. The claim to this injunction is founded on the covenant of Owen that the complainant should have, for ten years, the exclusive right to keep a store in that town. The objection made by Moffatt to the granting of this injunction against him is,—that he has the lawful and unrestricted possession, for a term of years, of the house and lot where he is engaged in trade; and that he has entered into no contract with any person not to vend merchandise there. This objection is supported by the facts in the case; and it is, in our opinion, sufficient to prevent the injunction prayed for.

The idea of the complainant that the covenant in question was a conveyance to him of the exclusive right of vending merchandise in New Harmony, can not be sustained. Such a right of the proprietor of real

[*303] estate to carry on trade upon his *premises, can

Taylor v. Owen and Others.

not be made the subject of a separate conveyance, so as to prevent the subsequent holder of the property, without his own agreement, from pursuing his lawful business there. This covenant between Owen and Taylor is entirely of a personal nature. It neither runs with the land of the covenantor, nor does it create any lien thereon, either legal or equitable. Had the fee-simple of the premises occupied by Moffatt, been sold and conveyed to him by Owen, it appears to us very clear that the purchaser's title could not have been affected, nor his rights arising from ownership diminished, by the collateral agreement alluded to. A lessee for years stands in the same situation, in this respect, as a vendee; and if the covenant before us would not interfere with the estate of the one, it will not with that of the other. We put out of view the question of notice in this case. We consider the mere circumstance of a lessee's having notice of a covenant like the present, to be of no more consequence to his interest in the premises than his knowledge of the lessor's having contracted a debt would be. A *bona fide* vendee or lessee of real property, for a valuable consideration, has nothing to do with these personal contracts.

Whilst Owen had the rightful possession of the whole town, he had of course a right to a monopoly of the business. This monopoly he had it in his power to permit the complainant to enjoy, by not selling any of the property to any other person, nor leasing any of it without inserting in the leases the necessary restrictions. In the case before us, however, Owen has thought proper to lease one of his houses and lots in the town to Rogers for three years, without restricting him as to the vending of merchandise; and Rogers has under-let a part of the premises to Moffatt without any restriction. The consequence is that Moffatt has the rightful possession of the part of the house he occupies: and, from the nature of the estate, he has the right to carry on there any lawful business he chooses, which is not prohibited by the ori-

 ffatt and Others, on Appeal.

is not injurious to the premises. The owner of the reversion, can not vend of merchandise there; the complainant, who has no pre-
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Taylor v. Owen and Or

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Taylor v. Moffatt and Others, on Appeal.

ginal lease and which is not injurious to the premises. Owen himself, who is the owner of the reversion, can not restrain him from the vending of merchandise there; much less can Taylor, the complainant, who has no pretence to any interest whatever in the property. If the covenant between Owen and Taylor, respecting the exclusive right referred to, be valid—as to which we [*304] give no *opinion—Taylor's remedy is by a suit at law against Owen for a breach of contract.

The objection made to these proceedings on the ground of a suppression of depositions, and of a refusal to continue the cause in order to take other depositions, can not be supported. The witnesses whose depositions were suppressed were directly interested; and, on the motion for a continuance, it is not shown that the depositions intended to be taken would be material in the cause.

Per Curiam.—The decree is affirmed with costs.

Hall, Dewey, Law and Judah, for the plaintiff.

Hawk, for the defendants.

TAYLOR v. MOFFATT and Others, on Appeal.

COVENANTS RUNNING WITH LAND—WHAT.

ACTION on the case for the disturbance of an exclusive right to vend merchandise, &c. Plea, a lease, &c. Demurrer to the plea, and judgment for the defendants. For the facts see the preceding case of *Taylor v. Owen and others*.

SCOTT, J.—It is alleged here, on behalf of the appellant, that Owen, being the owner of the land, could dispose of the soil itself, or any privilege appurtenant to, or growing out of it; that in this case he has, by his covenant with Taylor, divested himself of the right to vend merchandise in New Harmony; and it is inquired, can Mof-

Taylor v. Moffatt.

fatt possess greater privileges than his lessor? To this it may be replied, that an incorporeal hereditament may be conveyed to one, and the right of soil to another, and after a grant of the incorporeal hereditament, a conveyance of the land to which it is appendant is subject to that grant. But the privilege of vending goods is a right purely personal; it is not appended to the land or growing out of it; and when Owen covenanted with Taylor that he should have the exclusive right to vend merchandise in New Harmony, he did not by that covenant strip his land of any of its appurtenances. As soon as Moffatt obtained a lawful possession of the premises he occupies, he, as a free man, brought his personal rights into that place, as appendant to his person, and not to the land, and as long as that possession continues, he [*305] may lawfully exercise those *rights, unaffected and unrestrained by any contract or agreement to which he is not a party. We are clearly of opinion that the appellant has no ground of action.

Per Curiam.—The judgment is affirmed with costs.

TAYLOR v. MOFFATT.

OFFICIAL ACTS—LIABILITY FOR—JUSTIFICATION.—If a judicial officer, whether possessed of a general or a special jurisdiction, act erroneously or even oppressively in the exercise of his authority, an individual at whose suit he acts is not answerable, as a trespasser, for the error or misconduct of the officer. But if a judicial officer whose jurisdiction is special and limited, transcend his authority and act in a case of which he has no cognizance, his proceedings are *coram non judice*, and no person can justify under them.

ARREST—JUSTIFICATION—JURISDICTION OF COURT.—The defendant, in an action of false imprisonment, justified under a writ of attachment, ordered, at his instance, by a Circuit judge. The writ was issued against the plaintiff, for a contempt in disobeying a writ of injunction granted by the judge. The injunction was granted, and the writ of attachment was ordered and issued, in vacation. *Held*, that the defence was insufficient;

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the judge having no authority, in vacation, to order the writ of attachment (a).

ERROR to the Knox Circuit Court.

HOLMAN, J.—Taylor, claiming the exclusive privilege of vending merchandise in the town of New Harmony, filed a bill against Moffatt and others, charging Moffatt with a violation of this privilege by vending merchandise in said town; and praying an injunction. An injunction, agreeably to the prayer of the bill, was awarded by the president judge of the Circuit Court, in vacation. The writ of injunction having been served upon Moffatt, and it having been made to appear to the satisfaction of the judge, by the affidavits of Taylor and others, that Moffatt had disobeyed the writ and continued to vend merchandise as formerly, the judge, by his order, directed the clerk of the Circuit Court to issue an attachment against Moffatt for his contempt of the writ of injunction. The attachment was issued, and Moffatt was immediately committed to prison until the further order of the Court. For this commitment, he brought this action of false imprisonment against Taylor, at whose instance the attachment had been ordered. Taylor, together with a plea of not guilty, pleaded the proceedings in chancery, the judge's order, the attachment, &c., in justification; [*306] to which *Moffatt demurred and had judgment.

The jury, on the trial of the general issue, assessed the plaintiff's damages at 3,000 dollars; and judgment was given on the verdict.

The merits of the defence made by Taylor depend on the authority of the judge to order the attachment for the contempt. If the judge was acting within his jurisdiction, the plea of Taylor was a bar to the action, without any reference to the manner in which the judge's authority was exercised. Much has been said, in this case, about the ordering of the attachment without giv-

(a) 35 Ind. 285.

ing Moffatt an opportunity of being heard, and about the commitment for an unlimited time; but we conceive that these are subjects that can not affect the merits of Taylor's defence. For if a judicial officer, whether possessed of a general or a special jurisdiction, act erroneously, or even oppressively, in the exercise of his authority, an individual at whose suit he acts is not answerable, as a trespasser, for the error or misconduct of the officer. But if a judicial officer, whose jurisdiction is special and limited, transcend his authority, and act in a case of which he has no cognizance, his proceedings are *coram non judice*, and no person, much less a suitor, can justify under them. Nor do we consider it necessary to determine a question that has been raised in this case, as to the authority of a president judge, in vacation, to award injunctions for any other purpose except to enjoin proceedings at common law. But passing this question, and fixing our attention on the power of the president judge, in vacation, to order an attachment to enforce obedience to a writ of injunction which he had previously ordered, we find before us a question, in the determination of which we are but indirectly aided either by English or American decisions.

In England, and in many of the United States, the Courts of chancery are distinct from the common-law tribunals, and are continually open for the exercise of any necessary part of their jurisdiction. With us, the Circuit Court, with a general common-law jurisdiction, possesses all the chancery powers known to our law; but it is open only at stated periods fixed by law, and can take cognizance of no subject at any other time. This Court, at its regular terms, agreeably to the act of assembly by which it is organized, possesses a general authority as a

Court of chancery to issue any process that may [*307] be necessary *for carrying its powers into effect, according to the usages of Courts of chancery; and the president judge, in the absence of the two associates, is competent to hold this Court. Had the grant

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of chancery powers terminated here, neither the president judge, nor the two associates, nor all together, would have possessed any chancery powers whatever in vacation; but, in order to a proper distribution of justice, it was considered necessary that there should be, at all times, a tribunal that might act in cases of emergency, both at common law and in chancery. Certain powers were, therefore, conferred on the judges individually, and certain others on the president judge or the two associates. Among the latter is the power of awarding injunctions.

Now it may be considered as a general rule, that a grant of power to a Court, or a judge, to award process, includes a power to enforce obedience to that process by punishing disobedience. Hence, a Court of chancery exercises a general authority to issue attachments to punish contempts of its process; and there is no doubt but that our Circuit Courts possess this power; but they can exercise it in term time only. The president judge, when sitting as a Circuit Court, possesses this power in the fullest extent known to our law. His jurisdiction is then considered of a general and unlimited nature. But when he is acting in vacation his situation is different; his jurisdiction is special and limited. He can not be strictly said to be acting as a Court of chancery, inasmuch as the two associates, in the presence of each other, possess as extensive powers as he does; and they are not even in term time competent to hold a Court of chancery. So that it may be questioned whether he, when adjudicating on the subject-matter of an injunction regularly brought before him, possesses any further powers than those specially conferred by the act of assembly regulating the proceedings in granting injunctions; and such as may be necessary to prevent his being disturbed while he is thus officiating. But when he has completed an order for an injunction, and has closed his sitting, his power over the subject must be at an end. The case has passed from him into the Circuit Court, and obedience to the writ of

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injunction is to be enforced in the same way, as if it had been awarded by the Circuit Court. He has no time nor place given him by the law, when or where [*308] he can *judicially take any further notice of the subject, until the next term of the Circuit Court; but he is in the same situation, as to an exercise of chancery powers, as the Circuit Court is in vacation. Nor does this view of the case impose any peculiar hardship upon suitors. A complainant who has thus obtained an injunction is in the same situation as if he had obtained it in open Court. If the writ is disobeyed, he must wait until the next term of the Circuit Court before he can obtain process to enforce obedience to the writ, or to punish an individual who may have disobeyed it.

In this case, as we learn from the plea of Taylor, the judge awarded the injunction at his chambers, on the 29th of September, 1827. The writ of injunction was issued on the 1st of October; the affidavits show a vending of merchandise by Moffatt on the 4th, 5th and 6th of the latter month; and the order for the attachment is dated at the judge's chambers on the 8th. So that, from the foregoing view of the subject, the judge had no jurisdiction of the case at the time he ordered the attachment. The order was a nullity, and Taylor could not justify under it. The plea was no bar to the action, and the Circuit Court very properly sustained the demurrer. See an extensive view of the doctrine of chancery attachments in *Yates v. The People*, 6 Johns. R. 337, and *Yates v. Lansing*, 9 Johns. R. 395.

It was said by the plaintiff's counsel, in the argument of this case, that the damages are excessive, and that a new trial ought to have been awarded; but the statement in the transcript of the record, that a new trial was applied for in the Circuit Court and refused, is no part of the record, not having been made so by a bill of exceptions; and we have taken no notice of it.

Hobson v. Doe, on the Demise of Harper, on Appeal.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

Hall, Dewey, Law, and Judah, for the plaintiff.

Howk, for the defendant.

HOBSON v. DOE, on the Demise of HARPER, on Appeal.

EVIDENCE—TESTIMONY OF ABSENT WITNESS.

A PARTY is not permitted to prove what one of his witnesses swore to on a former trial of the cause, until he has proved that the witness is dead (1).

[*309] * (1) "What a witness, since dead, has sworn on trial between the same parties, may be given in evidence either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy, or it may be proved by any person who will swear from his memory to its having been given. *Per MANSFIELD, C. J., Mayor of Doncaster v. Day*, 3 Taunt. 262; *Strutt v. Bovingdon*, 5 Esp. 56. The witness must be prepared to prove the very words of the former witness. *Ennis v. Donisthorpe*, 1 Phill. Ev. 200; 4 T. R. 290." Roscoe on Ev. 58.* See, also, to the same effect, *Melvin v. Whiting*, 7 Pick. 79. It is held in Virginia that it is not necessary to prove the *very words* of the deceased witness, but that it is sufficient to prove the *substance* of his evidence. *Caton v. Lenox*, 5 Rand. 31. The cases cited in the last-named case, not mentioned above, are *Buckworth's case*, T. Raym. 170; *Pyke v. Crouch*, 1 Ld. Raym. 730; *Coker v. Farwell*, 2 P. Wms. 563; *White v. Kibling*, 11 Johns. R. 128; *Miles v. O'Hara*, 4 Binn. 103.

RENCH v. DOE, on the Demise of WEBSTER, in Error.

EJECTMENT—TITLE-BOND.

A PERSON claiming, by virtue of a title-bond only, the premises for which an action of ejectment was brought, applied to be made a defendant in the cause. *Held*, that, as the claim was merely of an equitable nature, the application could not be granted. *Smith v. Allen*, 1 Blackf. 22; *Lessee of Spencer v. Marckel*, 2 Ham. 264.

Howk v. Kimball and Another.

HOWK v. KIMBALL and Another.

JUDGMENT—PAYMENT AND ASSIGNMENT OF.—If a debtor pay his judgment-creditor a sum equal to the amount of the judgment, and thereby cause the judgment to be assigned as a payment to another of his creditors, the transaction does not discharge the judgment, but the same continues valid in the hands of the assignee.

ERROR to the Clark Circuit Court.

HOLMAN, J.—Kimball and Gerry each held a judgment against Faulkner and Jacob Teeple. Kimball's judgment was the eldest, and was replevied with Moore as replevin-surety: Gerry's was afterwards replevied with Moore and Anderson as sureties. A lot in Charlestown, the property of Jacob Teeple, was executed and sold on Kimball's judgment, and Kimball became the purchaser; leaving about 50 dollars of his judgment unsatisfied. It seems that, notwithstanding the sale of the said lot, Teeple still held a claim to it, which Kimball [*310] was *disposed to extinguish; and, in consideration of a deed by said Teeple relinquishing to Kimball all said Teeple's claim to said lot, Kimball paid the said Teeple the sum of 100 dollars, and assigned to John Teeple, son of the said Jacob, the balance still due on his said judgment. After this transaction, an execution issued on Gerry's judgment, which was levied on a tract of land, the property of Moore, the surety in both replevin-bonds; which tract of land was sold by the sheriff on said execution, and Howk, the complainant, became the purchaser. After this purchase, John Teeple caused an execution to be issued for the balance due on Kimball's judgment, and had said execution levied on the said tract of land; claiming a lien on said land by virtue of the elder judgment. Howk—contending that the transfer of the judgment from Kimball to John Teeple was in fact and equity a transfer to Jacob Teeple, and consequently a discharge of said judgment, and that the holding up of the

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same as unsatisfied, and issuing an execution thereon, was a fraud upon Moore, the surety, and the creditors of Jacob Teeple—filed his bill in chancery, making Kimball and the two Teeples defendants, praying an injunction, &c. The defendants answered, admitting the general statements in the bill, but denying fraud, and alleging that the transfer of the judgment from Kimball to John Teeple was in payment of a debt due from Jacob Teeple to John Teeple; said John having paid 52 or 53 dollars for the benefit of said Jacob. A general replication was filed. The cause was then heard in the Circuit Court on bill, answers and exhibits; and the bill was dismissed.

The only question here presented is, was Kimball's judgment discharged by Jacob Teeple in his contract with Kimball? In settling this question, it must be taken that this transaction between Kimball and the two Teeples was conducted with good faith; the charge of fraud in the bill being expressly denied by all the answers. So that we are not to presume fraud, unless it arises by intendment out of the premises. It is also evident that Jacob Teeple did not intend to discharge the judgment in his contract with Kimball. So that, if the judgment is to be considered as discharged, it must be on the ground that Jacob Teeple could not stipulate for a transfer of the judgment to a third person, and pay the consideration of that transfer, without *necessarily discharging the judgment, and thereby defeating the intention of his stipulation.

Taking this transaction in its simplest form, and giving it all its force in behalf of the complainant, let us consider it as if Jacob Teeple had paid to Kimball a sum equal to the full amount due on the judgment, as the consideration of the transfer from Kimball to John Teeple. Now it is well settled that a payer may direct the manner in which his payments are to be applied; and there can be no question but that while Kimball held the judgment against Jacob Teeple, said Jacob might have paid

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him several sums of money for various purposes, without discharging the judgment. If Jacob Teeple had paid him a sum equal to the amount due on the judgment, to be applied to some specific purpose, and he had so applied it, it could not be pretended that the judgment would have been thereby discharged. If, for example Jacob Teeple had placed money in his hands to be paid over to John Teeple, and had paid it accordingly, the judgment would have been affected by that transaction. In this view of the case we are supposing that Kimball was to pay Jacob Teeple 150 dollars for the lot; 100 dollars to be paid to Jacob Teeple himself, and the balance to satisfy a debt which he says he owed to John Teeple, or at least to secure it by a judgment. The payment of the judgment formed no part of the stipulations. The transfer of it, as so much money, from Kimball to John Teeple, was no more like a discharge of it, than if Kimball had paid the money to Jacob Teeple, and Jacob had paid it to John, and John had purchased the judgment from Kimball with it; which might have been done in good faith, and have produced the same result as has been produced by the agreement under consideration. So that if Jacob Teeple did really, in relinquishing his claim to the lot in Charlestown, pay to Kimball a price equivalent to the balance due on the judgment, as the consideration of the transfer from Kimball to John Teeple, yet as the judgment never became his, and as he did not intend to discharge it, it never was discharged either in law or equity. We see nothing in the transaction more unfair than the preferring one creditor to another. It seems that Jacob Teeple had a price in his hands, by which he might have discharged the judgment, and exonerated his surety, Moore, and also furthered his creditor,

Gerry, in the collection of his judgment; but he [*312] *preferred to let the judgment remain unsatisfied, in order to secure a debt which he says he owed to his son. But neither Moore nor Gerry has any greater

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reason to complain, that Jacob Teeple did not pay off the judgment, instead of stipulating for its transfer, than they have to complain that he did not pay it off with a part of the 100 dollars he received from Kimball, or that he did not apply the balance of the money he obtained from Kimball, in lessening the judgment of Gerry and the responsibility of Moore.

But it is not conclusive in this case that Kimball received, or supposed he received, a full equivalent for this judgment as a consideration of the transfer. He too might have had his preferences; and he might have been willing to transfer the judgment to John Teeple, for a smaller consideration than that which would have induced him to enter a discharge of the judgment in favor of Jacob Teeple. Besides this, the means by which Jacob Teeple procured this transfer to his son, as well as the 100 dollars to himself, seem, on the part of Kimball, to have been wholly gratuitous. As far as we are informed, Kimball, by his purchase at sheriff's sale, had as complete a title to the lot in Charlestown as either the law or Jacob Teeple could give him. So that Jacob Teeple had no claim to the lot either in law or equity. And neither law nor equity requires a resort to rigid constructions in search of fraud in the disposition of a fund which seems to have been obtained from Kimball more as a matter of favor than as a matter of right.

We, therefore, discover nothing fraudulent in the transfer of this judgment to John Teeple; nothing to prevent him from collecting the balance due upon it. Consequently we see no reason for reversing the decree of the Circuit Court.

Per Curiam.—The decree is affirmed with costs.

Howk, for the plaintiff.

Thompson, for the defendants.

Shewel v. Givan.

SHEWEL v. GIVAN.

INTEREST—OPEN ACCOUNTS.—It is a general rule that interest is not allowable on the open unliquidated accounts of merchants.

[*313] CUSTOM—FOREIGN STATE—HOW PROVEN.—*Witnesses are not admissible to prove a custom of merchants in any city of another state allowing them to charge interest on their accounts, when the Courts of that state have refused to recognize the custom.

INTEREST—INSTRUCTION.—Interest was charged by the plaintiff on an account for goods sold for which he sued. *Held*, that, all the evidence not being shown, he could not, in error, complain of the instructions to the jury, that they might allow interest or not at their discretion.

ERROR to the Marion Circuit Court.—Assumpsit by Shewel against Givan. The defendant pleaded, *inter alia*, non-assumpsit except as to a certain sum, and as to that a tender. Verdict and judgment for the defendant.

HOLMAN, J.—Assumpsit for goods sold and delivered. Several pleas, one of which is a tender and refusal of 150 dollars. The following bill of exceptions shows the state of the case before the Circuit Court: “On the trial of this cause, the plaintiff proved the sale and delivery of a bill of goods at Philadelphia to the defendant, some time in February, 1820, amounting to 347 dollars and 47 cents, on a credit. It was also proved that the following account, to wit, Mr. James Givan to Tho Shewel, Dr. 1820, Feb. 28. To merchandise at 6 mo. \$347.37. March 6, ditto, \$165.14. Interest up to Jan. 1827, \$194.54—\$707.05. Cr. 1821, Aug. 15, By cash, \$131.97. 1822, Aug. 22, ditto, \$128.13. 1826, Jan. 13, ditto, \$76.44. Interest up to Jan. 1827, \$80.37. Balance, \$290.14—707.05. Dr. 1827, Jan. 2, To balance, \$290.14. Interest. Cr. 1829, April 9, By cash, \$53.00. Interest—Thos. Shewel, Philad., was shown to the defendant, who remarked that it was well, or right, or made some such remark; but that the plaintiff must call on his son, John Givan, who had undertaken to pay it, and that he the defendant had nothing more to do with it. The said Givan also told Mr. Fletcher, that he had seen the said account and that it was correct. The

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plaintiff then introduced two of the merchants of Indianapolis, to prove that it was the custom, in Philadelphia, for sellers to charge, and buyers to pay, interest on the amount unpaid on such bills of merchandise after they became due; which evidence was objected to by the defendant, and the objection was sustained by the Court. To this opinion of the Court the plaintiff excepts. The plaintiff moved the Court to instruct the jury, that interest should be allowed on the above account after it became payable; which instruction the Court refused to give; but they instructed the jury, that it was discretionary [*314] with *them to allow interest or not, as they should think proper under all the circumstances of the case; which instruction was also excepted to by the plaintiff." The jury found for the defendant. A motion for a new trial was made and overruled, and judgment given on the verdict (1).

The errors assigned, and principally relied on, for the reversal of this judgment are, the refusal of the Circuit Court to admit evidence of the custom of the merchants of Philadelphia, relative to interest on their accounts; and the instructions given to the jury, that it was discretionary with them to allow interest or not, as they should think proper under all the circumstances of the case. Neither of these positions can be supported by authority. As a general rule, interest is not allowed on an open, unliquidated account. *Blaney v. Hendrick*, 3 Wils. 205; *De Havilland v. Bowerbank*, 1 Camp. R. 50; *Newell v. Griswold*, 6 Johns. R. 45; *Henry v. Risk*, 1 Dall. 265; R. C. 1824, p. 227. But admitting the general rule, the plaintiff claimed a right of showing, by witnesses, that the custom of merchants in Philadelphia is otherwise. Whatever doubts might be originated by this claim, if we did not know the law of Pennsylvania on this subject, yet no possible doubt can exist, when we know, by repeated decisions, that the laws of that state are in accordance with the general rule here laid down. See the above case of

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Henry v. Risk; and also the cases of *Delaware In. Co. v. Delaunie*, 3 Binn. 301; *Crawford v. Willing*, 4 Dall. 286; *Obermyer v. Nichols*, 6 Binn. 159. Not only is such the general law of Pennsylvania, but when an attempt was made in that state, in the case of *Henry v. Risk*, to set up this custom of the merchants of Philadelphia to allow interest in cases similar to this, it was repelled in the following language of Chief Justice M'KEAN: "The point has been repeatedly determined otherwise in this Court as well as in the Courts of England, and therefore witnesses can not be admitted to contradict the established principles of the law." The instructions given to the jury, that it was discretionary with them to allow interest or not, as they should think proper under all the circumstances of the case, appear to us to be unexceptionable; inasmuch as when we apply the foregoing general rule of law, with all its known exceptions, and the act of assembly regulating interest in this state, to such facts as the jury were necessarily bound to find from the evidence in this, we can *not say that such a case is presented, as peremptorily required the jury to allow any more interest on this account, than was tendered by the defendant and brought into Court.

The motion for a new trial because the verdict was contrary to evidence need not be considered, as it is not said in the bill of exceptions that we have all the evidence that was before the jury.

Per Curiam.—The judgment is affirmed with costs.

Fletcher and Merrill, for the plaintiff.

Brown, for the defendant.

(1) Form of the verdict, in such case, for the defendant: The jurors &c., as to the first issue within joined between the said parties, say upon their oath, that the said James Givan did not undertake or promise to an amount beyond the sum of 150 dollars within mentioned, in manner and form as the said Thomas Shewel hath within in that behalf alleged; and as to the last issue within joined between the said parties, the jurors aforesaid, upon their oath aforesaid, say, that the said James Givan did tender and offer to pay to the said Thomas Shewel, the said sum of 150 dollars, parcel of the several sums of money in the said declaration within men-

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tioned in manner and form as the said James Givan hath within in that behalf alleged. Arch. Forms, 146, 147.

The judgment for the defendant, on such a verdict, is the same as in ordinary cases, where there is but one issue, viz: that the plaintiff take nothing by his writ, &c.; and that the defendant recover his costs, &c. Ib.

Form of the verdict, in such case, for the plaintiff: The jurors, &c., say upon their oath that the said James Givan did undertake and promise to an amount beyond the sum of 150 dollars by the said James Givan within in that behalf alleged, that is to say, to the amount of 250 dollars, parcel of the several sums of money in the said declaration within mentioned, in manner and form as the said Thomas Shewel hath within complained against him; and they assess the damages of the said Thomas Shewel, by reason of the not performing the promises and undertakings within mentioned, over and above the within mentioned sum of 150 dollars, and over and above his costs and charges by him about his suit in this behalf expended, to 100 dollars. Arch. Forms, 145, 146.

The judgment for the plaintiff, on such a verdict, is for 100 dollars, together with costs, as in ordinary cases. Ib.

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CONDITIONS DEPENDENT—TENDER BEFORE SUIT.—The consideration of a title-bond was—the obligee's agreement to convey certain land to the obligor, on the same day on which the conveyance mentioned in the title-bond was to be executed, and to pay the obligor two promissory notes before that day, one in money and the other in personal property. *Held*, that the covenants were dependent and that the obligee's not conveying nor offering to convey the land, the conveyance of which was the main part of the consideration of the title-bond, was a bar to his recovery on that bond.

[*316] *FAILURE OF CONSIDERATION—LOST BOND—PRACTICE.—Debt on a bond. Plea, a failure of consideration, in consequence of the non-performance, by the obligee, of the condition of a certain bond which was lost. *Held*, that the loss of the bond did not preclude the defence.

ACCORD AND SATISFACTION—PLEADING.—If a plea of accord and satisfaction by the delivery to the plaintiff of certain property, does not state a time when the delivery was made, it is bad on special demurrer.

FRAUD—PLEADING.—A general plea to an action on a bond, that the bond had been obtained by fraud and covin, without setting out the particulars of the fraud, is good.

ERROR to the Marion Circuit Court.

BLACKFORD, J.—This was an action of debt by Peter Smock against the administrators of John Smock, founded on a penal bond of the intestate for 800 dollars, condi-

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tioned for his conveyance of a tract of land to the plaintiff on or before the 9th of February, 1827. The declaration avers that the obligor, having no title, fraudulently represented his title to be good; and that he acquired no title during his life-time, nor have the defendants acquired any since his death. The defendants pleaded three pleas in bar. The first plea is, that the bond declared on was given in consideration of the plaintiff's agreement by bond to convey to the intestate, on the 9th of February, 1827, a quarter section of land, situate in Jefferson county, in this state, being the land on which the plaintiff resided at the time of the contract; and in consideration of the plaintiff's note for 150 dollars, payable in personal property on or before the 10th of December, 1826; and in consideration of one 50 dollar note to be paid at the same time. Averment, that the bond to the intestate is lost; that the plaintiff had not conveyed the land to him, but to another person named George Owens; that the plaintiff had failed and refused to deliver the personal property contracted for, or any part thereof; and that the intestate had given up the 50 dollar note to the plaintiff at his request and without consideration. The second plea is an accord and satisfaction, by the delivering to the plaintiff a title-bond and two promissory notes, previously given by the plaintiff to the intestate. The third plea is, that the bond stated in the declaration was obtained from the intestate by fraud and covin. To all these pleas the plaintiff specially demurred. The objections made to the first plea are, 1st, the land is not sufficiently described; 2d, the contracts were independent; 3d, no demand of the personal property is shown; 4th, a lost bond can not [*317] be set up as a defence. To the second plea one *of the objections is, that no time is stated when the bond and notes were given up. The third plea is objected to, because the particulars of the fraud are not stated. These demurrers were all sustained by the Circuit Court;

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damages were assessed upon a writ of inquiry; and final judgment was rendered for the plaintiff below.

It is objected to the first plea, that the land which was to be conveyed to the intestate is not sufficiently described. It is set out as a quarter section of land in Jefferson county, in this state, on which the plaintiff resided at the time of the contract; and which he has since sold to one George Owens. This description is sufficiently particular. The next objection to the first plea is, that the contracts are independent. This objection can not be sustained. The consideration of the bond sued on was the plaintiff's agreement to convey certain land to the intestate, on the same day on which the intestate's conveyance was to be made, and to pay two promissory notes to the intestate some time before. The covenant of the intestate, therefore, was not independent. His liability depended on the plaintiff's previously conveying or offering to convey the land contracted for, and on his being ready to deliver the personal property at the time appointed, and on his payment of the 50 dollar note. Whether a failure as to any small part of this consideration would be a good defence, is not the question. Here the main part, to wit, the conveyance or offer to convey the land on which the plaintiff lived, was not performed. That failure is a bar to the action. This last remark is a sufficient answer to the third objection to this plea; because it shows that it is immaterial whether the failure to deliver the personal property is well pleaded or not. The plea would be good, even if there had been no default as to this part of the consideration. It is further contended against the first plea, that as the title-bond to the intestate is lost it constitutes no defence. The argument goes on the ground that an action at law will not lie on a lost bond. We are of opinion, however, that an action at law may be brought on such a bond; and if so, it may furnish a good defence in a case like the present. *Reed v. Brookman*, 3 T. R.

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151 (1). For these reasons, we consider that the first plea filed is a good bar to the action.

The objection to the form of the second plea, [*318] viz., that the *time of the delivery of the bond and notes is not stated, is a good one. That point is decided in *Cunningham v. Flinn*, Nov. term, 1823 (2). The demurrer to this plea was correctly sustained.

The third plea is *per fraudem* generally. The objection is, that the particulars of the fraud are not set out. This general mode of pleading fraud we conceive to be correct. It is supported by good authority. *Wimbish v. Tailbois*, Plowd. Com. 38, 54; *Tresham's case*, 9 Co. Rep. 108; *Knight v. Peachy*, T. Raym. 303; 1 Chitt. Pl. 553; 2 Chitt. Pl. 464, 603; 3 Chitt. Pl. 563; *Mason v. Evans*, Coxe's Rep. 182; *Gordon v. Gordon*, 1 Stark. Rep. 396 (3).

It is therefore the opinion of the Court that the demurrers to the first and third pleas should have been overruled.

Per Curiam.—The judgment is reversed, &c., with costs Cause remanded, &c.

Brown, for the plaintiffs.

Sweetser, for the defendant.

(1) In the case of *Read v. Brookman*, it was held that a deed may be pleaded as "lost by time and accident," without making profert of it; but in the case of *Hendy v. Stephenson*, 10 East, 55, a justification in trespass was pleaded, which, after stating that the defendant was possessed of a right of common under a grant, proceeded as follows: "which deed is since lost or destroyed by accident and length of time, and therefore can not be brought into Court here, and the date thereof is, and the particular parties thereto are, for that reason, wholly unknown to the said defendant:" the Court held this bad, as being much too loose in the description of the deed. Note to *Bigg v. Roberts*, 3 Carr. & Payne, 43.

(2) Vol. 1 of these Rep. 266.

(3) Vide *Huston et al v. Williams*, May term, 1833.

THE STATE v. PEARCE.

ADULTERY—DEFINITION.—If a man have criminal intercourse with a married woman, the offence is adultery and not fornication.

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ERROR to the Johnson Circuit Court.

BLACKFORD, J.—Indictment against the defendant for living in open and notorious fornication with Elizabeth Shaffer. Plea, not guilty. On the trial, the de-
[*319] fendant proved that he was *married to the woman named in the indictment. Witnesses were then offered, on the part of the state, to show that this woman had a husband living at the time the defendant married her, and that this fact was known to the defendant at the time of his marriage. This testimony was objected to, and the objection sustained. Verdict and judgment for the defendant. There is no error in these proceedings. The evidence rejected might have proved the defendant guilty of adultery, but it could not have proved him guilty of fornication. Jacob's Law Dic. Tit. Adultery. The question whether the defendant could be again tried, had the testimony been improperly rejected, need not be examined.

Per Curiam.—The judgment is affirmed with costs.

Wick, for the state.

Fletcher and *Brown*, for the defendant.

(1) If a man be indicted as an accessory to a felony, and he be proved guilty as a principal, he must be acquitted, because the minor offence is merged in the greater. *R. v. Gordon*, 1 Leach, 515; Arch. C. L. 449. So, if a man be indicted for a misdemeanor in burning his own house which was adjoining other houses, and it be proved that, in consequence of the burning of the defendant's house, the adjoining houses were burnt, the defendant must be acquitted; the misdemeanor being merged in the felony. Isaac's case, 2 Russ. on C. 1659.

END OF MAY TERM, 1830.

[*320]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1830, IN THE FIFTEENTH YEAR OF
THE STATE.

KIMBLE, Assignee, *v.* ADAIR.

PRACTICE—OPEN AND CLOSE.—The party on whom the affirmative of the issue lies, has a right to open and conclude the cause (a).

ERROR to the Franklin Circuit Court.—A suit was brought in a justice's Court on a sealed note, by Kimble, assignee, against Adair, the maker. The note reads as follows: "On or before the first of March next, for value rec'd, I promise to pay John Spangler, or order, 25 dollars; provided the said Spangler has not made any compromise, or received any pay for timber cut on the land which he purchased of W. H. Eads and has this day given up. Witness my hand and seal this 27th of Oct. 1827.—*John Adair*, (SEAL)." Judgment in favor of Kimble. Appeal to the Circuit Court by Adair; in which Court, conformably to the statute, Kimble was the plaintiff and Adair the defendant. On the trial in the Circuit Court, the defendant having admitted the execution of the note,

(a) 11 Ind. 218; 37 *Id.* 284.

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was permitted to open and conclude the cause. Verdict and judgment for the defendant.

HOLMAN, J.—The right of opening and concluding a case belongs to him who holds the affirmative; [*321] and from all that we *can learn of the nature of the defence in this case the affirmative was with the defendant. There being no plea or written defence, and the execution of the note being admitted, there was nothing required on the part of the plaintiff to secure his case; and unless something was shown by the defendant, under the proviso in the note, to defeat his claim, he would obtain a verdict and judgment as a matter of course. It seems to us that it lay upon the defendant to show that the plaintiff had entered into a compromise, or had received a compensation for cutting timber, as mentioned in the proviso, and this was affirmative matter. We are not able to comprehend how the plaintiff's claim, under the circumstances of the case, could have been resisted but by affirmative matter; and such matter as, if formed into a regular plea, would have given the defendant the right of opening and concluding the case. We, therefore, see nothing on this point to authorize a reversal of the judgment (1).

Per Curiam.—The judgment is affirmed, with costs.

M'Kinney and Morris, for the plaintiff.

Stevens, for the defendant.

(1) *Trespass qu. cl. fr.* Plea, as to coming with force and arms and whatever else was against the peace, not guilty; as to the residue, a right of way, which was denied by the replication. *Held*, that the defendant should begin, as not guilty as to the force and arms was not a general issue, and did not throw any necessity of proof on the plaintiff. *Hodges v. Holder*, 3 Camp. R. 366.

A similar decision to the above was made in a subsequent case, in which BAYLEY, J. says, that the denial of what is against the peace is merely to save a fine to the king; that the party who has to prove the affirmative of the issue ought to begin; that where there are several issues, and the proof of one of them lies on the plaintiff, he is entitled to begin, that the question of damages never arises till the issue has been tried. *Jackson v. Hesketh*, 2 Stark. R. 518.

Trespass for an assault and battery. Plea, (without the general issue,) that the plaintiff was a mariner on board a ship, of which the defendant was commander, and that the plaintiff was engaged in a mutiny, to sup-

 Vanblaricum and Another v. Yeo, Administrator.

press which the defendant committed the trespass. Replication, *de injuria*. The defendant was directed to begin. *Bedell v. Russell*, Ry. & Mood. 293.

Assumpsit. Plea in abatement, that the promises were made jointly with A. Replication, that they were not made jointly with A. On the trial of this issue, the defendant begins. *Fowler v. Coster*, 3 Carr. & Payne, 463.

In an action for a libel, there were pleas of justification, but the general issue was not pleaded, and the affirmative of the issue was on the defendant. *Held*, that the plaintiff had not a right to begin, with a view to prove the amount of his damages; but that the right to begin was with the defendant. *Cooper v. Wakley*, 3 Carr. & Payne, 474.

Trespass for taking goods. The defendant pleaded (without the [*322] general issue) a *justification under a commission of bankruptcy. Replication, denying the bankruptcy. The defendant was permitted to begin. *Cotton v. James*, 3 Carr. & Payne, 505.

 VANBLARICUM and Another v. YEO, Administrator.

ADMINISTRATOR DE BONIS NON—COMPLAINT BY.—In an action by an administrator *de bonis non*, the declaration should state the name of the first administrator, and contain an averment of non-payment to him.

SEAL—WHAT.—An ink seal commonly called a scroll has the same effect, by statute, as if it were made with wafer or wax.

ERROR to the Marion Circuit Court.

BLACKFORD, J.—This was an action of debt. The declaration commences as follows: Joshua Yeo, administrator *de bonis non* of all and singular the goods and chattels which were of Jesse M'Kay, deceased, complains of David S. Vanblaricum and John Vanblaricum, &c. In the first count the cause of action is stated to be a certain instrument of writing subscribed by the defendants, in the following words: "On or before the 1st of Feb. 1826, we or either of us promise to pay Jesse M'Kay or order 220 dollars, for value received this 29th of Jan. 1825.—D. S. Vanblaricum, (SEAL). John Vanblaricum, (SEAL)." It is not averred that the defendants sealed this instrument, nor is it called a writing obligatory. The second count is upon a certain other writing, for the payment of the same amount of money, the substance of which writing is described. The declaration assigns as

a breach of these contracts that the money had not been paid either to M'Kay, to the plaintiff, or to any other person; and concludes with a profert of the letters of administration *de bonis non*, granted to the plaintiff. The defendants demurred specially to this declaration, and assigned the following causes of demurrer: 1st, the declaration does not state the name of the first administrator, nor does it aver a non-payment of the money to him; 2dly, the instrument described in the first count is not declared on as a writing obligatory or deed, though it is shown to be sealed; 3dly, the writing described in the second count is not alleged to be a writing obligatory, nor to be an instrument in writing not under seal. The plaintiff below joined in demurrer. The Circuit Court considered the declaration good, and the plaintiff obtained a judgment.

The first objection, which goes to the whole [*323] declaration, is, *that the name of the original administrator is not given, nor is it stated that the money had not been paid to him. This objection is fatal. The defendants had a right to plead payment to the original administrator, without averring specially that he was such administrator. To enable him to do this, the declaration must state who that administrator was. The plaintiff below, who is the defendant in error, relies upon the case of *Catherwood v. Chabaud*, 1 Barn. & Cress. 150. In that action, however, which was by an administrator *de bonis non*, the declaration showed who was the original administrator. The defendant there pleaded the general issue; and the question on the trial was, whether the plaintiff, in proving his title, was bound to produce not only the letters of administration to himself, but also those to the first administrator. The Court held that the first letters need not be produced—not, however, because proof of that administration was unnecessary, but because the letters *de bonis non* were sufficient evidence of both administrations. That case, therefore, is not an authority for

the omitting to aver, in the declaration, the existence of the original administration. It is rather an authority against such an omission. We have examined several precedents of declarations, by administrators *de bonis non*, in *Wentworth* and *Chitty*. They all commence as follows: "A. B., administrator of all and singular the goods and chattels, rights and credits, which were of C. D., deceased, who died intestate, which were not administered by E. F., also deceased, who was administrator of all and singular the goods and chattels, rights and credits of the said C. D., complains, &c." From this view of the present case we are satisfied that this declaration is defective for not giving the name of the first administrator, and for not averring a non-payment to him.

This opinion makes it unnecessary to examine, particularly, the subsequent objections. It may be remarked, however, in passing, that we consider the instrument of writing described in the first count to be a writing obligatory. The ink seals used have the same effect as if they were of wafer or wax. The putting on the seal, whether with ink or with wax, is an agreement that the writing is to be considered a deed. Stat. 1824, p. 296 (1). The first objection goes to the whole declaration, and the demurrer to it should have been sustained.

Per Curiam.—The judgment is reversed, &c.
[*324] Cause *remanded, with directions to permit the plaintiff below to withdraw his joinder in demurrer, and amend his declaration.

Brown, for the plaintiffs.

Fletcher and *Merrill*, for the defendant.

(1) Accord. R. C. 1831, p. 407.—*Bradfield v. M'Cormick*, Nov. term, 1832. In the eastern states, sealing with wafer or wax or some other tenacious substance, as at common law, is requisite. In the southern and western states generally, a scroll is a seal. Evidence is required, in Virginia, of the intention of the parties to substitute the scroll for a seal. In New York, a seal can only be made as at common law. 4 Kent's Comm. 2d Ed. 452. The following is the language of the Court in Maryland: "From the earliest period of our judicial history, a scrawl has been considered as a seal, and it would be too late at this day, and would be attended with

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consequences too serious, to permit it to be questioned. It is not necessary, as has been argued, that the scrawl must be adopted by the obligor, by a declaration in the body of the bond, or single bill, to make it his seal. It is sufficient if the scrawl be affixed to the bond, or bill, at the time of its execution and delivery. For, if he execute and deliver it with the scrawl attached, it being considered here as equivalent to the wax or wafer, it is as much his seal as if he had declared it to be so in the body of the instrument. The fact of the clause of attestation not appearing in the usual form of "*signed, sealed, and delivered*," can, in reason, make no difference; for the question always is, is this the seal of the obligor? and if he has delivered it with the scrawl attached, it is his seal, and must be so considered; for whether an instrument be a specialty, must always be determined by the *fact* whether the party affixed a seal; not upon the *assertion* of the obligor, in the body of the instrument, or by the form of the attestation." *Trasher v. Everhart*, 3 Gill & Johns. 246.

GREEN and Others v. VARDIMAN and Others.

CHANCERY PRACTICE AND PLEADING—ANSWER.—It is a general rule that an answer in chancery is to be taken as true, unless it be disproved by two witnesses, or by one witness and corroborating circumstances (a).

SAME.—This rule, however, does not extend to every thing which the answer contains in favor of the defendant: it applies only to that part of the answer which is directly responsive to the charges in the bill.

ANSWER IN AVOIDANCE—PRACTICE.—Matters which are set up in avoidance and which are not responsive to the bill, must, when in issue, be proved by the defendant (b).

SAME—PRACTICE.—If the answer admit a fact, but rely on a distinct fact in avoidance, the defendant must prove the fact on which he relies.

STATUTE OF FRAUDS—PARTNERSHIP.—A. and B. purchased jointly a land-office certificate for a tract of land, on which there were some improvements, and the assignment of the certificate was made to A., who had paid more of the purchase-money than B. The purchasers, by a parol agreement, divided the land. By this agreement, A. received several acres more than B., together with the improved part of the premises, and was to pay B. a certain sum as the difference in value of the two parts, and to assist B. in improving his part. Each of the parties took possession of his own part of the premises. *Held*, that the agreement was not affected, in equity, by the statute of frauds.

[*325] *ERROR to the Fayette Circuit Court.

HOLMAN, J.—The children and heirs of Nancy Green, deceased, by Daniel Green their father and guardian, filed their bill in chancery; stating that John Var-

(a) 8 Ind. 411. (b) 9 Ind. 132.

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diman, their grandfather, died in Kentucky, leaving a large estate real and personal, and leaving Mary Vardiman, his widow, and John T. Vardiman, Peter Vardiman, William Vardiman, Morgan Vardiman, George W. Vardiman, and the said Nancy Green, wife of the said Daniel Green, and Elizabeth Wilson, wife of Benjamin Wilson, his heirs; that Mary Vardiman and Morgan Vardiman administered on his estate and received the whole, including two negroes, into their possession; that afterwards, John T. and William jointly purchased the certificate for 100 acres of land, in paying for which John T. paid 200 dollars for William, and took the certificate in his own name; that John T. died, leaving a large estate beside said land and said debt from William, before he had received his distributive share of his father's estate, leaving the remaining heirs of John Vardiman, deceased, his lawful heirs; that William and Morgan administered on his estate; that, before the distribution of either of said estates Peter Vardiman died, leaving the remaining heirs of John Vardiman, deceased, his lawful heirs; that George W. Vardiman administered on his estate; that Nancy Green died, leaving the complainants her lawful heirs. All the other heirs, &c., are made defendants. The bill makes general and special charges of waste of the several estates, and of a failure to pay the complainants their distributive share. One of the special charges is, that, after the death of John T., William, instead of accounting for the 200 dollars that John T. had advanced for him, set up a pretended agreement made between him and the said John T. in his life-time, that John T. should pay William 75 dollars for five acres of land, and also assist him to clear five acres and build a cabin on it; which contract, if any took place, the bill charges to be void, the same not being in writing. The bill requires special answers as to the amount of each estate, and as to all the particulars of the administration item by item: not only as to all to what had been received, but also to what had been paid out;

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including a full disclosure of all the circumstances of the supposed agreement between John T. and William.

Mary Vardiman and Morgan Vardiman plead-
[*326] ed, that they *had fully administered the estate of John Vardiman, deceased, except two negroes ; that they, with the said Daniel Green, in the life-time of Nancy Green, entered into a written agreement to submit all matters, relative to Nancy Green's share of said estate, to arbitration ; that an award was made agreeably to said submission, requiring certain payments to be made to said Green, which they had made and received said Green's acquittance ; referring to the arbitration-bond, the award and the acquittance as a part of their plea ; that as to the two negroes, all the heirs of the said John Vardiman, deceased, after they came to full age, including the said Daniel and Nancy Green, executed a power of attorney to Morgan Vardiman, authorizing him to sell said negroes for the benefit of said heirs, which power of attorney is also made part of the plea ; and that, by virtue of said power, said Morgan did sell said negroes. These defendants are ruled to show cause, why they should not answer the bill as to all the particulars of their administration. They show for cause, that they fully administered said estate in the state of Kentucky, and settled and closed all their administration accounts in a county Court in Kentucky, agreeably to the laws of that state. This cause was adjudged insufficient, and they are ruled to answer the bill. In their answer they set forth all the particulars of their administration, stating that they had fully paid to the said Daniel Green, in the life-time of Nancy Green, her full share of said estate.

Morgan and William Vardiman answered according to the requisitions of the bill ; exhibiting, as they say, a full and minute account of the administration of the estate of John T. Vardiman, deceased, showing the amount that was left for distribution ; of which, they allege they paid Daniel Green, in the life-time of Nancy Green, her full

share. In answering that part of the bill that requires a disclosure of the transactions between John T. and William, they say that John T. paid more than his proportion of the money for the purchase of the land, and took the assignment of the certificate in his own name; that William afterwards made him some payments; that when they divided the land, John T. received about five acres more than his proportion, and also received that part on which was a spring and an improvement; that he agreed to allow William 75 dollars for the difference in the [*327] value of the two tracts, and also to perform *an equal part of the labor in clearing five acres on the tract allotted to William, and of erecting buildings thereon equal to those on his tract; that each took immediate possession of his part, and continued to exercise a quiet and undisturbed ownership over it; that John T. did not perform said labor, and that in their administration, they selected men, who are named in the answer, to estimate the value of the labor that John T. had agreed to perform; that said men estimated the value of the labor at a sum which they, in their answer, aver it was reasonably worth; that a patent for said land was not obtained during the life of John T., but was issued in his name after his death.

George W. Vardiman answered as to his administration of the estate of Peter Vardiman, deceased; from which it appears that, of the personal estate, nothing was left for distribution; that Peter left a tract of land, of which Daniel Green, as guardian of the complainants, has received their proportion.

The complainants filed a general replication.

There is no answer by Benjamin and Elizabeth Wilson, nor does it appear that any measures were taken to obtain their answer. They seem to have been forgotten. We mention this circumstance, by the way, not on account of the bearing it will have in this case, but on account of the inconvenience such proceedings sometimes occasion,

by the final disposition of a case before all the parties are before the Court. No depositions were taken. The case was finally heard on the plea, answers, replication and exhibits; and the Circuit Court dismissed the bill without prejudice.

By agreement of the counsel on each side, the exhibits are not copied in the record, but it is admitted of record in this Court that they are to be taken to be just as they are alleged to be in the pleadings.

The first object in this case that presents itself for our attention is the plea of Mary and Morgan Vardiman. This plea presents a complete bar to the complainants for any claim on the estate of John Vardiman, deceased. The submission to arbitration, the award, the compliance with that award, and the acquittance, all which we understand were proved by the exhibits referred to, settle all matters

in controversy, except as to the negroes. The answer, that they were afterwards ruled to *make of the particulars of their administration, presents no new case; but only shows the matters that were, or might have been, in controversy before the arbitrators, and which were settled by the award. The case of the negroes rests upon different premises. Slaves in Kentucky, if we are correctly informed, are not strictly personal estate; and are not subject to be sold by administrators, unless for the payment of debts in the absence of personal funds. So that the administrators would not be liable for them any more than for lands, unless there was a special charge that they had disposed of them, or had refused to deliver them up to the heirs when demanded. So that the general inference to be drawn from this plea, that they had not administered these slaves, would exonerate them from the claim of the complainants. The execution of a power of attorney by the heirs, which it seems was proved by its exhibition, authorizing Morgan Vardiman to sell these slaves, so far as it goes, shows that the heirs considered the slaves as under their control, and

subject to their order; and as this is rebutted by no circumstance in the case, it must be considered as the fact. So that the further allegation, that Morgan took possession of the slaves and sold them for the benefit of the heirs by virtue of the power, requires no proof in order to discharge the administrators. The liability of Morgan, as a special trustee, for the price of these slaves is not within this case; as the bill only charges him as an administrator, and as such he is not liable. But if it should be considered that the bill was intended to charge him as a special trustee, the charge is evidently deficient; as it is not stated that he has received the price for which the slaves were sold, and failed to pay it over; or has in any other way violated said trust.

The principal question, however, presented for consideration in this case, is how far the answer of a defendant, to which there is a replication, is to be taken as evidence of the facts stated in it? It is a general rule that an answer is to be taken as true unless disproved by two witnesses, or by one witness and corroborating circumstances; and when the term answer is taken in its strictest sense, we believe there are no exceptions to this rule; but an answer in this sense is not what a defendant may say in his own behalf, but what he says directly responsive to the charges in the bill. Matters, how-
[*329] ever; that are set *up in avoidance, that are not responsive to the bill, when in issue, must be proved by the defendant; for if the answer admits a fact, but insists on a distinct fact in avoidance, the defendant must prove this fact. *Hart v. Ten Eyck*, 2 Johns. C. R. 62. On this part of the subject there are many nice distinctions and cases that it is difficult to reconcile. An executor, in his answer to a bill by the creditors for an account of the personal estate, stated that he had received 1,100*l.*; that in making up his accounts he gave his bond for 1,000*l.*; and that the testator gave him the other 100*l.* for his trouble and pains in his business: it

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was held that this answer did not discharge the defendant of the 100l.; the gift by the testator being a fact distinct from what he was required to answer, and so in avoidance of the demand against him. *Gilb. Ev.* 57. *S. C.* cited also in *Bull. N. P.* 237, and in *1 Stark. Ev.* 292. But it was held that if it had been one fact, as that the testator gave him 100l., it ought to have been allowed. *Ib.* So, in *Ridgway v. Darwin*, 6 *Ves.* 404, an executor charged by his answer, is not permitted to discharge himself by affidavits of payments made to the testator in his life-time. So a party charging himself in schedule to his answer, can not discharge himself in another schedule showing his disbursements. *Boardman v. Jackson*, 2 *Ball & Beat.* 385. And a party charged by his answer can not discharge himself by it unless the whole is stated as one transaction; as that on a particular day he received a sum and paid it over; not that on a particular day he received a sum and on a subsequent day he paid it over. *Thompson v. Lambe*, 7 *Ves.* 587. Also to a bill by the assignee of a note, stating that he gave a valuable consideration for the note and requiring an answer to the whole bill—the answer, stating that the note was assigned for a usurious consideration, requires proof. *Green v. Hart*, 1 *Johns. R.* 580. There are many similar cases, which seem to render it doubtful what matters in an answer require proof, and what are supported by the answer itself; and those cases that turn on the unity of the transaction which creates a charge and discharge, are peculiarly perplexing. But we can not conceive that any of those cases are intended as exceptions to the general rule—that the answer, so far as it is strictly such, being directly responsive to the bill, is to be taken as true.

For, when the bill requires a disclosure of such [*330] matters as may *discharge the defendant, he is compelled to answer and disclose those matters; and if the disclosure amounts to a discharge, he is entitled to the full benefit of it. But although the bill

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might not require a disclosure of the matters set up in avoidance, yet if the charge and discharge arise from one indivisible transaction, and the answer sets forth that transaction, the defendant shall have the full benefit of the discharge. But, we conceive, the principal difficulty in all these cases turns on the question, what facts in the answer are responsive to the bill, and what are set up in avoidance. Such was the point on which the case of *Green v. Hart* and some others evidently turned. We are therefore of opinion that, when the answer is confined to such facts as are necessarily required by the bill, and those that are inseparably connected with them, forming a part of the same transaction, the answer is to be taken as true when it discharges, as well as when it charges the defendant. See a note in the index to Johns. C. Reports, 7 Vol. p. 75, as to the opinion of the Court of Errors in *Hart v. Ten Eyck*, connected with a remark of SPENCER, J. on this subject in *Simson v. Hart*, 14 Johns. R. 63. In the case before us the answers are directly responsive to the requirements of the bill, and are to be taken as true notwithstanding the replication.

But it must be further observed that facts set forth in an answer and considered as true, are to be considered according to their legal import, whether they amount to a discharge or not. Hence, it becomes necessary to examine the nature of the facts thus set up by the answer. In this case, the transaction between John T. and William Vardiman, respecting the tract of land jointly purchased by them, requires attention. There is a considerable difference between the bill and answer, as to the part which each paid of the purchase-money; but the most material difference arises out of the manner in which the land was divided. The answer, which agreeably to the foregoing rule we considered as true, states that in the division of the land John T. received several acres more than his proportion, and also a spring and improvements; and agreed to allow William 75 dollars as the difference

in the value of the two lots, and to perform an equal part of the labor of clearing five acres and erecting buildings on William's part, equal to those already erected on his own part; that each took possession of his [*331] *respective part, and remained in the quiet enjoyment of it. The bill states that if such an arrangement did take place, it was void by the act for preventing frauds and perjuries. But we conceive that that act is not applicable to the case: First, the agreement as to the division line, and as to the payment of the difference in value between the two lots, is not within the act. A parol agreement to abide by a division line is obligatory. *Jackson v. Dysling*, 2 Caines, 198. And when a tract of land held jointly by two can not be equally divided in point of value, an agreement by one to pay the other the difference in value is not, we conceive, within the terms of the act; for the act contemplates a transfer of lands or some permanent interest in them. *Bostwick v. Leach*, 3 Day's Cas. 476. And a promise to pay for improvements made on land is not within the act. *Frear v. Hardenbergh*, 5 Johns. R. 272. So an agreement to abate in the price, what the land falls short of the number of acres named in the deed, is not within the act. *Mott v. Hurd*, 1 Root, 73. Secondly, the agreement to make an allowance for the difference in the quantity of land, under the peculiar circumstances of the case, is not within the act. Viewing it as a contract for the sale of land, it comes within one of the exceptions that equity has always raised to the act—a partial execution of the contract, and an execution so far as it was in the power of the parties at that time. From the manner of the original payments, it seems that William was indebted to John T. for a part of the original purchase-money. So it may be said that John T. had paid William for this land, and had received quiet possession of it. So that if William had held the title, John T. might have enforced a specific performance of the contract; or, as the title was virtually in John T., if he had

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not paid the purchase-money, William could have recovered it; for an agreement to pay money in consideration of the conveyance of land is not within the act, after the conveyance has been executed. *Chapman v. Allen*, Kirby, 400. But William had no title to the land. He had only an equitable claim, arising, as far as appears, by parol—a trust, resulting from the payment of the purchase-money; and such a trust has never been considered within the act. Besides, that right which originated by parol may be relinquished by parol. When John T. agreed to allow Wil-

liam so much for the difference in the quantity [*332] of land, the transaction is more in the nature of lessening William's claim upon him, than of a purchase of so much land. Moreover, as John T. held the certificate and would receive the title for the whole tract, it would be impossible for William to coerce a conveyance of any part of the land without showing a clear equity; and surely he could show no equity, as to the land he had thus voluntarily relinquished for a valuable consideration, either executed by payment, or executory by promise. Thus we see nothing exceptionable in this arrangement, and nothing to prevent the administrators of John T. from setting up a discharge of this claim of William, as a legal defence against so much of the complainants' demand. There are no other facts in the answers that require particular attention. And we are of opinion that they present a full answer to all the allegations of the complainants.

Per Curiam.—The decree is affirmed with costs.

Smith, for the plaintiffs.

Rariden, for the defendants.

 COWGILL v. WOODEN, Sheriff.

JUSTICE OF PEACE—DEFENCES—PLEADING.—The statute of 1827 requires that, in justices' Courts, special matters of payment and set-off should be

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stated in writing ; but, in other cases generally, special pleas are not necessary in those Courts.

SAME.—In a cause commenced in a justice's Court, the defendant may without pleading the general issue, give any matters in evidence which, under that plea, are admissible in other Courts.

SAME—RIGHT TO JURY.—A party has the same right to a jury, in a cause commenced by notice and motion, that he has in other cases.

JURY—CHALLENGE OF—CHOSEN BY PARTY.—If the sheriff, a party in the cause, have summoned the jurors selected under the statute of 1827, the array may, for that reason, be challenged.

JUDICIAL SALE—LIABILITY OF PURCHASER.—If a purchaser of real estate at sheriff's sale refuse to pay the purchase-money, and the property be sold for a less sum at a second sale, the liability of the first purchaser for the difference, under the statute of 1825, may be established by parol evidence.

SAME—RIGHT OF OFFICER AS TO BID.—The sheriff is not obliged to take the mere word of any person, who may bid at a sheriff's sale, that he is the agent of the execution-creditor.

JUSTICE—JURISDICTION.—A justice of the peace has jurisdiction of a cause commenced by notice and motion, if the notice set forth a claim, not exceeding 100 dollars, for which debt or assumpsit would lie.

APPEAL from the Owen Circuit Court.

BLACKFORD, J.—Wooden sued Cowgill before a [*333] justice of the *peace by notice and motion. The substance of the notice is, that the plaintiff, as sheriff of Owen county, offered certain real estate for sale on execution, and struck off the same to the defendant as the highest bidder ; that the defendant having refused to pay the purchase-money, the plaintiff re-sold the land to the highest bidder at the second sale, for 74 dollars and 99 cents less than the first bid ; and that the defendant was liable to the plaintiff for that sum. The defendant before the justice pleaded, previously to the trial, six special pleas in bar. A replication was filed to one of them, and a general demurrer to four of the others. The remaining one seems to have passed unnoticed. Whilst the trial was progressing, the defendant put in a seventh plea, denying generally the whole cause of action. The justice tried the cause on the merits, and gave judgment in favor of the plaintiff for the amount claimed in the notice. The

defendant appealed to the Circuit Court. The questions raised by the demurrers to the special pleas were argued in the Circuit Court, and all those pleas, except one, were adjudged to be good bars to the action. A jury was then impaneled on motion of the plaintiff, the merits of the cause tried without objection, and a verdict and judgment rendered for the plaintiff.

One of the pleas was that of the statute of frauds. The others were intended to show that the defendant did not bid for himself; but that he acted only as agent of the creditor, under whose execution the land was sold, to the amount of his claim; and as to the residue of the sum bid, that he acted as agent of another execution-creditor, who was entitled to the surplus. This special pleading is unnecessary in justices' Courts. By the statute of 1827, p. 30, special matters of payment and set-off must be stated in writing, but no special pleas are required in matters of defence like those relied on in the present case. The seventh plea, which was the general issue, was filed too late to be available, had it been necessary. But as the parties went to trial on the merits, the case must be considered now as if the general issue had been pleaded. Indeed, the defence here made required no plea in writing, either general or special, in a justice's Court. We shall examine the record before us, therefore, without any reference whatever to the validity of the pleas filed [*334] by the defendant, considering him to have *had the right to prove his defence if a good one, without any written pleas (1).

The first bill of exceptions shows that, on application of the plaintiff, the Circuit Court impaneled a jury to try the cause. This was correct. There were matters of fact to be determined, and a jury was the proper tribunal to try them. *Dawson v. Shaver*, Nov. term, 1822 (2). It also appears by this bill that the regular panel of jurors had been summoned by the plaintiff as sheriff of the county; that the Court overruled a challenge to the array founded

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on that cause; and that the coroner selected, from the regular panel, the twelve jurors who tried the case. This challenge should have been sustained. It is true, the sheriff has not, under our statute, the same discretion in summoning jurors that he formerly had. Stat. 1827, p. 29 (3). He would, however, now have a decided advantage over his opponent in a cause, had he the right to execute the venire. Some jurors, whose names were in the venire, might be too intelligent or too independent to suit his purpose. These he could omit to summon. The cause of challenge relied on in this case is considered in *New York*, under a statute for selecting jurors similar to ours, to be sufficient to quash the array. *Woods v. Rowan*, 5 Johns. R. 133.

According to the second bill of exceptions, the defendant's bid was not reduced to writing; nor is any such formality required by the statute under which he was charged. Stat. Dec. 1825, p. 50. The statute provides, that if the highest bidder does not pay, he shall be liable to a certain extent, should the land bring less at a second sale. It appears to us, that the fact of the defendant's being the highest bidder, as charged in the notice, might be proved by parol. These bids at sheriffs' sales are always made publicly and by parol, and may be proved by the persons present. The cause of action grows out of the defendant's default in not following up his bid by a payment of the money. The case stands independent of the statute of frauds. If he made the bid and refused compliance, he is liable under the statute of 1825; and his liability may be established by parol evidence (4). It is further stated by this bill, that the defendant offered to prove that he was the agent of the first execution-creditor, in bidding to the amount of his execution, and the agent of another execution-creditor entitled to the residue

[*335] of the *bid; but that the sheriff had no evidence of the defendant's agency, except his own declarations at the sale. The Circuit Court refused to receive

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this testimony, and we think correctly. The sheriff was not bound to take the bare word of any person who might choose to bid and call himself an agent of the execution-creditor. Were that the law, the sheriff would have no means of avoiding serious and frequent imposition.

The third bill of exceptions states that the defendant below offered in evidence a deed from the debtor to a purchaser for value, made before the judgment. This evidence was rejected. The defendant's object was to raise the question whether he was liable, if the land bid for was not the debtor's at the time. The record, however, does not show what land, if any, was conveyed by this deed; and the question, therefore, intended to be presented does not arise in this case.

The last bill of exceptions shows that an objection to the jurisdiction of the Court was overruled. This objection is founded on the idea that the justice had no jurisdiction in the case of a notice and motion like the present. By the statute of 1827, p. 30, the justices' jurisdiction is extended to 100 dollars in actions of debt and assumpsit. The statute of 1825, authorizing a notice and motion in these cases, in any Court having jurisdiction, does not require a particular name to be given to the action. The notice before us sets forth a demand not exceeding 100 dollars, for which debtor assumpsit would lie; and consequently exhibits a case within the jurisdiction of a justice of the peace (5).

The only error in these proceedings is, the overruling of the challenge to the array. The judgment, on that ground, must be reversed.

Per Curiam.—The judgment is reversed, and the verdict set aside with costs. Cause remanded, &c.

Whitcomb and Gregg, for the appellant.

Hester, for the appellee.

(1) For the pleadings required in justices' Courts, vide R. C. 1831, p. 301. The defendant always has the benefit of the general issue in a justice's Court, without pleading it; except the execution of an instrument of

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writing, which is the foundation of the action, be denied; in which case there must be a plea filed supported by oath or affirmation. *Ibid.*

(2) Vol. 1. of these Rep. 204.

[*336] * (3) Accord. R. C. 1831, p. 291.

(4) If the purchaser neglect or refuse to pay, he is liable, on motion of the officer making the sale, to a judgment for the purchase-money and ten per cent. with costs, without any stay of execution. Provided, however, that the officer may, on the day of sale or on a subsequent day, re-expose the property to sale; and should the amount of the second sale not be equal to that of the first and the costs of the second sale, the first purchaser is liable for the deficiency, on motion of the officer. Stat. 1833, p. 65.

(5) Vide *Washburn v. Payne*, ante, p. 216, and note.

THE STATE, for the use of PUTNEY v. HICKS and Others.

PRACTICE—OYER—ERROR.—To deny oyer where it ought to be granted is error, but not *e converso*.

OFFICIAL BOND—DEFENCE.—In an action in a sheriff's bond against the principal and his sureties, for money collected by the sheriff on an execution in favor of the plaintiff, the defendants can not plead that there is no judgment on which the execution issued (*a*).

APPEAL from the Scott Circuit Court.

SCOTT, J.—This record presents the following case: In the year 1827, while Hicks was sheriff of Scott county, an action was brought against him and his sureties, on his official bond, at the instance of Thomas M'Camet, and for his benefit. On the 19th of July, in that year, judgment was rendered for 5,000 dollars, the penalty of the bond, and damages were assessed in favor of M'Camet, to the amount of 26 dollars and 47 cents. On the 11th of December, in the same year, Richard E. Putney sued out of the office of the clerk of the Scott Circuit Court, and placed in the hands of Hicks an execution of fieri facias against Daniel W. Griffith and his sureties on a replevin-bond for the sum of 122 dollars and 82 cents, which money Hicks collected on said execution, and refused to pay over to Putney, the execution-plaintiff, or

(a) 32 Ind. 104; 37 *Id.* 457.

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request. On the 18th of March, 1829, Putney sued out, in the name of the state of Indiana, his scire facias against Hicks and his sureties, to recover the amount collected on his execution, under the provisions of the statute of 1824. The defendants cravedoyer of the judgment or replevin-bond on which the execution issued, and demurred to the scire facias. The demurrer was overruled. They then filed two pleas; first, that there was not any record of the said supposed judgment and replevin-bond, on which the said execution was issued; [*337] *and, secondly, that, before the suing out of the scire facias, the plaintiff had instituted a proceeding by motion, in the Scott Circuit Court, against the defendant Hicks for the same demand; which proceeding was still depending and undetermined. There was a demurrer to the first plea. To the second the plaintiff replied *nul tiel record*, on which issue was joined, and judgment on that issue was for the plaintiff. The demurrer to the first plea was overruled, and judgment rendered for the defendants; and to reverse that judgment is the object of this appeal.

Two special errors are assigned: 1st, that the Court erred in grantingoyer of the judgment or replevin-bond; and, 2dly, that the validity of the judgment or replevin-bond could not be inquired into by the defendants in this suit. We think there is nothing in the first assignment. To denyoyer where it ought to be granted is error, but not *e converso*. Tidd's Pr. 530; 2 Ld. Raym. 970. See, also, 2 Salk. 497; 2 Str. 1186; 1 Wils. 16 (1). The second assignment rests on better authority. In the case of *Wakefield v. Lithgow*, 3 Mass. Rep. 251, it was decided, that where a sheriff collected money on an execution, he is bound to pay it over to the execution-plaintiff on demand. Where the writ is from a Court of competent jurisdiction, an error or irregularity in the rendition of the judgment, or in the previous proceedings, furnishes no excuse to the officer for withholding the money. The

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sheriff recognized the legality and authority of the execution by acting upon it; and, after having collected the money, it is not for him to say that the writ was illegal or unauthorized by the judgment. In the case of *Smith v. Bowker*, 1 Mass. Rep. 81, it was held that the officer is not holden to look beyond his execution; and, whether the judgment be erroneous or not, is a question with which he has nothing to do. See, also, *The People v. Waters*, 1 Johns. Cas. 137. The judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Stevens, for the appellant.

Thornton, for the appellees.

(1) *Osborne et al. v. Reed*, Vol. 1, of these Rep. 126. The party to whom over is improperly granted can not complain, the error being to his advantage. 2 Ld. Raym., cited in the text.

[*338] *BLANEY v. FINDLEY and Others.

JUDGMENT—REVERSAL—PRACTICE.—If the facts relied on to reverse a judgment be not shown by the record, and the judgment would be authorized by any facts which might have been legally before the Court, the judgment must be affirmed (a).

ATTACHMENT-BOND—APPROVAL—PRACTICE.—An attachment-bond must be approved of by the clerk who issued the writ. His approval, however, is not conclusive but only *prima facie* evidence of the sufficiency of the sureties.

ERROR to the Jefferson Circuit Court.

HOLMAN, J.—Blaney commenced a suit by foreign attachment against Findley, Harrison and Burnett, in the Jefferson Circuit Court. The writ issued on the 23d of June, 1829, and was levied the same day on the lands of Burnett, and returned at the July term of said Court.

(a) See 51 Ind. 271; 1 *Id.* 263; 60 *Id.* 37; 37 *Id.* 145.

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At that term notice of the pendency of the attachment was ordered to be published. In the ensuing vacation the defendants entered special bail. At the next term the plaintiff filed his declaration, and the defendant moved the Court to quash the attachment and dismiss the suit, because, 1st, the affidavit on which the proceedings are founded is informal and insufficient in law to warrant the issuing of the attachment; 2dly, the writ of attachment is informal and erroneous; 3dly, the bond, given by the plaintiff, is informal and insufficient in several particulars, to wit, 1st, the sureties are insufficient in a pecuniary point of view; 2dly, the plaintiff and his sureties reside in Floyd county; 3dly, the clerk of the Jefferson Circuit Court, who issued the attachment, did not approve of the bond and sureties. The Court sustained the motion, and set aside the proceedings, and gave the defendants a judgment for costs.

There is no bill of exceptions to show us on what grounds the Court decided; but as the presumption of law is in favor of the decision, if there were any facts that could have been legally before the Court that would authorize their judgment, we are bound to sustain it. The affidavit states that the defendants were "justly indebted," instead of saying in the words of the act of assembly, that the debt was "justly due and owing." If this case rested solely on the objection to this affidavit, it would demand

particular attention; as it is, we shall pass it [*339] *with a single remark, that it is always safe to use the terms of the act of assembly, and frequently unsafe to use others. The bond in this case, it seems by a statement in the record, was taken and acknowledged before a justice of the peace of Floyd county, who is certified to be a justice of the peace by the clerk of the Floyd Circuit Court. The said clerk also certified that, in his opinion, the sureties were responsible men and good for the penalty of the bond. This bond was filed in the office of the Jefferson Circuit Court before the attachment

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issued. The act of assembly requires, that the bond and sureties shall be approved of by the clerk who issues the attachment. R. C. 1824, pp. 67, 69 (1).

The first objection to the bond is, that the sureties were insufficient. The bond is in the penalty of 7,000 dollars, and the clerk of the Floyd Circuit Court certifies that the sureties are good for that amount. This certificate, not being official, is a mere private opinion in writing, and inadmissible as evidence of the fact thus certified. What evidence was before the Court of the insufficiency of the sureties, is unknown to us; but that they might have had satisfactory evidence of the fact, and might have dismissed the suit for want of sufficient sureties, is ample ground on which to sustain their decision. But it is contended that, before the Court dismissed the suit for the want of sufficient sureties, they should have given the plaintiff an opportunity of perfecting his bond. We do not know that the plaintiff desired such a privilege, or was in a condition to have profited by it; nor do we know what the Court did or refused to do on the subject. Whatever might have been said or done about this matter, forms no part of a regular record. It was unnecessary for the Court, in order to justify their decision, to show of record, that they called upon the plaintiff to file a new bond, and that he refused to do so. This objection to the bond might be sustained, if it were certain that the clerk had approved of the sureties, which the defendants contend was not the fact, as the approval of the clerk, though *prima facie* evidence of the sufficiency of the sureties, is not conclusive. The defendant may show that the fact is otherwise; and the Court has a superintending control over the discretion thus exercised by the clerk. It is objected that this motion was made too late; but as it was made at [*340] the first term after notice was given *of the pendency of the attachment, and at the first appearance of the defendants, this objection cannot be supported.

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Per Curiam.—The judgment is affirmed with costs.
Sullivan and *Farnham*, for the plaintiff.
Stevens, for the defendants.

(1) Accord. R. C. 1831, pp. 75, 82.

KNIPE v. KNIPE.

STATUTE LIMITATIONS—RUNNING ACCOUNTS.—In 1804, the father of B. and C. delivered to B., in England, 75*l.*, with directions to pay the same to C. on the latter's arrival in America. In 1818, C. came to America where B. was then resident, and accounts on both sides immediately commenced between them, and continued running until 1826. The 75*l.* was charged in the account of C. against B. *Held*, that these mutual accounts, including the 75*l.*, were not within the statute of limitations; some of the items having been furnished within five years before the commencement of the suit.

ERROR to the Wayne Circuit Court.

SCOTT, J.—Thomas Knipe brought an action of debt against John Knipe in the Wayne Circuit Court. In the declaration the defendant is charged, among other things, for money had and received and interest thereon. The defendant pleads to so much of the plaintiff's declaration as goes to charge him with money had and received, and interest thereon, that no action accrued to the plaintiff within five years next before the commencement of the suit. The plaintiff replies that the money had and received and the interest thereon, were items in an account current commenced in the year 1818, and continued running open, and unsettled, until the year 1826; and that the last item of the said account accrued within five years next before the commencement of the suit. The defendant rejoins, that the said supposed money was not an item in the account current between the said parties; but that the same was received, if received at all, more than five years before the commencement of the said mutual deal-

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ings; and concludes to the country. On the rejoinder issue is joined. There are other pleas and issues, but the only objection to the judgment grows out of the issue stated. As no exception was taken to these pleadings in the Circuit Court, we will now inquire into their [*341] *correctness. It may be remarked, however, that the rejoinder contains two allegations, the first of which only responds to the replication, and is that only on which, without a surrejoinder, an issue could regularly have been taken. The issue, then, may be considered as taken on the first member of the rejoinder, and the other part may be rejected as surplusage. This, with other issues, was submitted to the jury, and there was a general verdict for the plaintiff. A motion for a new trial was made by the defendant's counsel, and overruled by the Court. Judgment on the verdict.

It was in proof, as appears by a bill of exceptions, that the defendant had admitted, at different times, that he had received of his father, in England, 150 pounds sterling, in the year 1804, one-half of which was for the plaintiff, who was at that time a resident of England; that the said money was to be paid to the plaintiff when he should arrive in America; that, on his arrival in America, the defendant was to furnish him with necessaries for his family subsistence for one year, the cost of which was to be taken out of his part of the money; that plaintiff came to America in 1818; that accounts on both sides commenced at that time between the said parties, for mutual dealings in other matters together with the necessaries aforesaid, and continued open and running between them on both sides until the year 1826; that the said money was charged in the plaintiff's account, but whether with or without the knowledge of the defendant was not proved, and that the accounts on both sides still stood open till the commencement of this suit. The jury, in their verdict, included the sum of 75*l.* sterling, with interest thereon from September, 1818. On this ground the

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motion for a new trial was predicated; and on this ground the plaintiff in error claims a reversal of the judgment.

It is alleged by the plaintiff in error that the 75*l.*, a moiety of the 150*l.*, having been received in England so long before the commencement of the mutual dealings of the parties in America, could not be considered as forming an item in their account current. The money received in England was to be paid to the defendant in error on his arrival in America, which it appears was in 1818. No action accrued to him till that time. Immediately on his arrival he was, by agreement, to be furnished with [*342] necessities for his family subsistence out of that fund. It is natural and reasonable in this state of their transactions, that Thomas Knipe, the defendant here, in keeping a regular account of his dealings with John Knipe, would place the money, in the hands of John, on the debit side of the account, and credit the different sums of money or other articles as he received them. This would be honest dealing. And had the parties thought proper to close their business and adjust their accounts within two or three years, no one would suppose that this deposit, in the hands of John, would be omitted in balancing their mutual accounts. Then if that money was, at any time, so connected with the mutual dealings of the parties, that a fair and honest settlement of their accounts could not be made without taking it into the calculation, it must remain an item until their accounts are finally liquidated. The circumstance of the later items being of so recent a date, as to be within the limit of the statute, was a sufficient justification of the verdict. 2 Saund. 127, n. 6; 6 T. R. 189 (1).

Per Curiam.—The judgment is affirmed, with 2 *per cent.* damages and costs.

Rariden, for the plaintiff.

Smith, for the defendant.

(1) "Such accounts as concern the trade of merchandise between merchant and merchant are excepted from the operation of the statute. Where

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there have been mutual, current, and unsettled accounts between the parties, and any of the items are within six years, such items are evidence (under the replication that the defendant did promise, &c.) as an admission of there being an open account, so as to take the case out of the statute, like any other acknowledgement. *Catling v. Skoulding*, 6 T. R. 189; 2 Saund. 127, *a. n.* But where all the items are on one side, the statute is a bar to all demands above six years' standing. *Cotes v. Harris*, B. N. p. 149. Where there are mutual accounts, but no item of account at all within six years, the plaintiff may reply specially to the plea of the statute, that the accounts are merchants' accounts. 2 Saund. 127, *c. n.* But it has been held in equity that merchants' accounts are within the statute, if they have ceased six years. *Barber v. Barber*, 18 Ves. 286. And see *Jones v. Pengree*, 6 Ves. 580; *Martin v. Heatcote*, 2 Eden, 169. The clause in the statute as to merchants' accounts is not confined to persons actually merchants. *Catling v. Skoulding*, 6 T. R. 191." Roscoe on Ev. 261. See, also, *Cogswell v. Dolliver*, 2 Mass. 217; *Coster v. Murray*, 5 Johns. C. R. 522; *Kimball v. Brown*, 7 Wend. 322; *Buntin v. Lagow*, Vol. 1 of these Rep. 373; R. C. 1831, p. 401. With the respect to the exception in the statute as to *merchants' accounts*, see the subject fully discussed, and most of the authorities cited, by MARSHALL C. J., in *Spring et al. v. The Executors of Gray*, 6 Peters, 151.

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*LARKIN v. WILBURN, in Error.

IN an action of replevin by Larkin against Wilburn, the defendant avowed the taking of the goods as a distress for rent, due to him from the plaintiff. To this avowry the plaintiff pleaded *non tenuit* and *riens in arrear*. Issues were joined upon these pleas. There was a verdict for the defendant on both the issues; the jury finding the amount of rent in arrear, but not the value of the goods distrained. The Court *held*, that the common-law judgment for a return of the goods to the defendant, and for his costs of suit, might be rendered on this verdict; but that there could be no judgment in his favor for the arrears of rent (1).

(1) If the verdict, as in the case in the text, be against the plaintiff, the jury should inquire concerning the sum of the arrears, and the value of the distress; and the defendant will thereupon have judgment for the rent arrear, if the distress amount to the value of it with costs. If the value of the distress be less than the arrears of rent, the judgment is for the value of the distress, with costs. R. C. 1831, pp. 425, 426; 17 Car. 2 c. 7; 3 Selw. N. P. 379.

 Allen v. Clark and Others.

ALLEN v. CLARK and Others.

DECEDENT'S ESTATE—SETTLEMENT.—The settlement of an administrator's accounts in the Probate Court is, *prima facie*, correct; and a Court of chancery will not interfere with it, except in clear cases of mistake or fraud (a).

ERROR to the Franklin Circuit Court.

BLACKFORD, J.—Bill in chancery by the heirs of Clark against Allen, surviving administrator of Clark. The record shows that Clark died in 1816; that letters of administration were granted to Allen, Bell, and H. Clark; and that Allen was the acting and surviving administrator. It is shown that Allen, in 1819, made a settlement of his accounts in the Probate Court; that a balance was found in his favor of 318 dollars and 90 cents; and that, in 1820, he received that sum in payment from H. Clark, one of the other administrators. The bill charges mistakes and frauds in the defendant's accounts, and [*344] prays a *decree for the amount in his hands. The answer denies all fraud, and avers the account as settled in the Probate Court to be correct. The Circuit Court tried the cause upon the bill, answer, and exhibits, and rendered a decree in favor of the complainants for 745 dollars and 58 cents.

It is contended by the plaintiff in error that the Court of chancery has no jurisdiction in this case. In this he is mistaken. The settlement of accounts in the Probate Court is an *ex parte* proceeding, and ought not to preclude all future investigation of the subject. The Probate Court, however, is a Court of record, specially invested by the legislature with jurisdiction in these cases, and its decisions are entitled to great respect. An account settled in that Court, whilst the facts are of recent date, is *prima facie* correct. The Court of chancery can only interfere in clear cases of mistake or fraud; and the com-

 (a) Post 377; 12 Ind. 381; 26 *Id.* 124; 48 *Id.* 584; 51 *Id.* 96.

Markle v. Steele, on Appeal.

plainant must be held to strict proof. In this case, there are a few obvious mistakes, which it is proper to correct; but we are of opinion that the principal charges in the bill are not sufficiently supported. The result of our investigation of the cause is, that the decree of the Circuit Court should have been in favor of the complainants for the sum of 214 dollars, together with the costs of suit.

Per Curiam.—The decree, as to the 214 dollars and the costs, is affirmed; and as to the residue, the decree is reversed.

M'Kinney and Caswell, for the plaintiff.

Morris, for the defendants.

MARKLE v. STEELE, on Appeal.

PRACTICE—MONEY HAD AND RECEIVED.

STEELE, resident in another state, forwarded to Markle, in Indiana, who was not an attorney at law, a note against Hotchkiss for 200 dollars, to be collected. Markle placed the note in the hands of an attorney at law for collection. The attorney collected the money, and left the country without paying it over to Markle. *Held*, that Steele could not, under these circumstances, sustain an action for money had and received against Markle. *Held*, also, that if Markle could be made liable for the money in any form of action, it must be on one founded [*345] on his *having acted fraudulently or imprudently in entrusting the note to the attorney; or on his having failed to use proper means to obtain the money from the attorney after its collection. *Vide Beardsley v. Root*, 11 Johns. R. 464; *Duncan v. Littell*, 2 Bibb, 424; *Locket v. Bohannon*, 3 Bibb, 378; *Duncan v. Skipwith*, 2 Camp. 68; *Nightingal v. Devisme*, 5 Burr. 2589.

Elderkin v. Shultz.

ELDERKIN v. SHULTZ.

NOTE—ASSIGNMENT—PARTIES.—The assignee of a debt—to obtain certain securities for the same which had been executed by the debtor to the assignor's attorney, and assigned by the attorney to a third person—filed a bill in chancery against the attorney and his assignee. *Held*, on demurrer, that the plaintiff's assignor should have been made a party.

ERROR to the Floyd Circuit Court.

SCOTT, J.—Jesse Wilson and Samuel Wilson, in the year 1819, executed to one Thomas Hixson an obligation for the payment of 1,193 dollars and 93 cents, payable 120 days from date. Thomas Hixson endorsed and delivered over the said note or obligation to Nathan Hixson. In the year 1821, Nathan Hixson delivered the said obligation to Elderkin and Hagen, attorneys at law, for collection. In the year 1824, Elderkin compounded and compromised with Jesse Wilson for the said debt, and took from the said Jesse four several promissory notes, for the sum of 366 dollars and 31 cents each, payable in one, two, three, and four years; which notes were made payable to Elderkin, and not to Hixson. Jesse Wilson, at the same time, executed to Elderkin a deed of mortgage for a certain tract of land in Floyd county, as a further security for the payment of the said notes. Elderkin assigned and delivered over the said notes to Caleb Newman, to secure the payment of a sum of money advanced to him by said Newman, and retained the mortgage in his own possession. In the year 1826, Nathan Hixson, for a valuable consideration, executed to Christian Shultz, the defendant here, an instrument of writing, purporting to be an assignment and transfer, to the said Shultz, of all his right, claim, and interest in and to the said debt, describing the nature of the claim and authorizing Shultz to collect it. Shultz called on Elderkin, and made a demand of the notes and [*346] mortgage; but Elderkin *refused to deliver them. Shultz filed his bill in the Floyd Circuit Court,

Elderkin v. Shultz.

setting out the foregoing facts and praying relief. Elderkin, Hagen, and Newman are made defendants; but the bill was afterwards dismissed as to Hagen. The bill charges that Elderkin is insolvent, and that Newman received the notes with a full knowledge of Hixson's right. Newman appeared and answered the bill. Elderkin demurred on the ground that Hixson was not made a party. The Court decreed that the defendants, Elderkin and Newman, should, within 90 days, deliver the aforesaid notes and mortgage to the complainant or his attorney, and pay costs, &c. Elderkin has brought this writ of error to be relieved from the operation of that decree.

It is the constant aim of a Court of equity to prevent litigation, and so to settle the rights of all parties, as to make the performance of their decree perfectly safe to those who are compelled to obey it. Mitf. Pl. 144. On this principle it was decided, in a suit brought by the assignees of a judgment, that they could not succeed, because they had not brought the assignors before the Court. *Cathcart v. Lewis*, 1 Ves. jun. 463. Also, in the case of *Knollys v. Alcock*, 7 Ves. 563, the Lord Chancellor said, if a question of worth and value is to be agitated, the Court will not decide upon it, without every one being a party whose rights can be affected by the decision. In this case, Hixson had, by the complainant's own showing, an interest in the matters charged in the bill. Had the defendants been compelled to perform the decree, they might nevertheless have been afterwards called upon to answer the complaint of Hixson, whose rights could not be affected by a decision where he was not a party. See, also, 2 Madd. Ch. 142, 143. The demurrer should have been sustained.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

Hawk and Nelson, for the plaintiff.

Farnham, for the defendant.

Ricks v. Doe, on the Demise of Wright.

RICKS v. DOE, on the Demise of WRIGHT.

CONVEYANCE—NOTICE—PRIORITY OF TITLE.—A subsequent conveyance of real estate, although first recorded, will not prevail against [*347] *a prior one which is not recorded until after the expiration of the time prescribed by law, if the subsequent purchaser had actual notice of the prior conveyance (a).

ERROR to the Perry Circuit Court.

HOLMAN, J.—Ejectment for a lot of land in the town of Rome. Wright, the plaintiff's lessor, claimed title to the premises by virtue of a deed of conveyance, executed to him by Crume on the 10th of June, 1829, and acknowledged and recorded on the same day. After the plaintiff had exhibited his title, the defendant, who claimed as landlord of the premises, offered in evidence a deed executed to him by the said Crume, for the same lot, on the 18th of March, 1822, and acknowledged on the same day, but not recorded until the 20th of August, 1829. He also offered Lamb, the recorder of the county, who had taken the acknowledgment of both deeds, as a witness to prove that the lessor of the plaintiff, before he purchased the lot, had notice of the existence of the defendant's deed. This deed and parol evidence were rejected by the Circuit Court, and the plaintiff obtained a verdict and judgment.

This case turns upon the question whether a subsequent deed, though first recorded, will hold the legal estate against a prior deed of which the subsequent purchaser had notice, when the prior deed was not recorded within twelve months after its execution? The act of assembly of 1818, pointing out the mode of conveying real estate, which was in force when the defendant's deed was executed, and which, being re-enacted in 1824, still continues to be the law, declares, that unless a deed is recorded within twelve months after it is executed, it

(a) See 17 Ind. 542.

shall be adjudged fraudulent and void against a subsequent purchaser for a valuable consideration, unless such deed be recorded before the recording of the deed under which the subsequent purchaser claims. Stat. 1818, p. 207; R. C. 1824, p. 333 (1).

Under the registry acts in England, and the regulations respecting the recording of deeds in most of the United States, it never has been questioned but that a subsequent purchaser, with notice of a prior deed though not recorded is chargeable with fraud in a Court of equity, although his deed is regularly recorded. He is considered as a *mala fide* purchaser, uniting with the vendor to defraud the prior vendee; and neither justice nor good conscience will permit him to retain what [*348] he *knew, at the time of his purchase, was the property of another. *Wyatt v. Barwell*, 19 Ves. 435; *Le Nere v. Le Nere*, 3 Atk. 646; *Gillespie v. Moon*, 2 Johns. C. R. 585. To give our act of assembly the most rigid construction, and declare that the deed of Ricks was absolutely void as to Wright, notwithstanding his notice of the prior deed, still, if the fact of notice were clearly established, it would vitiate this title, and a Court of chancery would consider him as holding the legal estate in trust for Ricks. This would in fact have been the case if Ricks had held but a title-bond for the lot; and his taking a deed can not render his claim less available in equity.

There is not, however, the same uniformity of decision as to the right of a Court of law to take cognizance of the fraud. It is a general rule that fraud is cognizable in Courts of law as well as in Courts of equity. The same rules of construing statutes prevail in both; and each is bound to give such a construction as will carry the evident intention of the legislature into effect. Hence the conclusion is fairly deducible that a Court of law is not bound to give efficacy to a claim founded on a deed evidently vitiated by fraud, whether direct or construct-

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ive. The case of *Jackson v. Burgott*, 10 Johns. R. 457, is directly in point, so far as the principle is concerned, as the act of assembly of New York is the same as ours. And the following language used by Ch. J. KENT in that case is not inapplicable to this, on the supposition that the defendant substantiates the fact of notice: "When the statute says that every deed, not recorded, shall be adjudged fraudulent and void against a subsequent purchaser for a valuable consideration, whose deed shall be recorded, it undoubtedly meant a subsequent purchaser *in good faith*, and who did not purchase with a fraudulent intent. A subsequent purchaser, *mala fide*, is not within the purview of the act and not intended to be protected; for the statute never meant to give sanction to fraud, or to render a fraudulent act legal."

We are therefore of opinion that the evidence was improperly rejected; that the defendant had a right to show that the plaintiff's lessor had notice of his deed before he purchased; that the purchase was fraudulent; and that no estate was derived by it which is available either in law or equity.

[*349] **Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Hall and Dewey, for the plaintiff.

Battell, for the defendant.

(1) Accord. R. C. 1831, p. 270.

ELDER v. LASSWELL and Others.

SET-OFF—PARTIES.—A debt due by A. and B. to C. can not be set off, either at law or in equity, against a debt due by C. to A. alone (a).

SAME—PRACTICE.—There is no difference, on the subject of set-off, between Courts of law and equity; the rule is the same in both Courts.

(a) See 58 Ind. 52; 55 *Id.* 216; 53 *Id.* 221; 10 *Id.* 333; 53 *Id.* 216; 14 *Id.* 20.

ERROR to the Perry Circuit Court.

BLACKFORD, J.—Bill in chancery by Elder against Lasswell, Comstock, Chenault, and Burke. The substance of the bill is, that the complainant and one Arnold Elder, since deceased, executed their note to Lasswell for 550 bushels of corn; that in 1826, before this note became due, they obtained from Chenault and Burke, by assignment, a sealed note, executed by Lasswell and one Ephraim Comstock for 1,020 dollars and 82 cents due on the 1st of March, 1820; that Lasswell refused to permit this note to be set off against the one he held for the corn, and has obtained a judgment against the complainant for 88 dollars, in a suit at law on the last-mentioned note. The bill further states that both Lasswell and Comstock are insolvent; and that their joint note could not be set off by the complainant, in the action at law against him on the note given to Lasswell alone. The prayer of the bill is, that the judgment at law be enjoined, and the set-off allowed. A written objection in the following words was filed to the bill, viz: "The defendant, Lasswell, now moves the Court here, that the above cause be dismissed for want of apparent equity; and that the said defendant be allowed his costs expended in that behalf—Crawford, Sol." The Circuit Court dissolved the injunction and dismissed the bill, with costs and damages.

The complainant's object is to set off his joint note on Lasswell and Comstock, against Lasswell's [*350] judgment on a note *executed to him alone by the complainant. It is admitted that the set-off is not admissible at law; but it is contended that it may be received in equity. This distinction, relied on by the complainant, between Courts of law and equity, on the subject of set-off, does not exist. The rule is the same in both Courts. This precise point is settled in the case of *Dale and others v. Cooke*, 4 Johns. C. R. 11. The bill can not be sustained.

There is an informality in the manner in which the

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bill was objected to. The objection, however, was in writing and makes a part of the record. It is in substance a demurrer.

The decree of the Circuit Court against the complainant is correct, and must be affirmed.

Per Curiam.—The decree is affirmed. To be certified, &c. (1).

Dewey and Hall, for the plaintiff.

Crawford, for the defendants.

(1) A re-hearing was granted in this cause; but it was not submitted again to the Court. It was dismissed by agreement of the parties. The set-off was inadmissible. *M'Kinney v. Bellows*, May term, 1832.

MERRIMAN v. MAPLE.

INDORSEMENT—RELEASE OF MAKER.—The assignee of a promissory note assigned before it was due, delayed thirty days after it became due before he sued the maker. *Held*, that the indorser was not liable in such a case, for the maker's default, unless the indorsee could show that an earlier proceeding was impracticable, or would have been unavailing (a).

ERROR to the Carroll Circuit Court.

SCOTT, J.—Assumpsit by the assignee of a sealed note against the assignor. Plea, non-assumpsit; issue; and judgment for the plaintiff. Two other pleas were rejected on demurrer. We learn from the record, that the note was made by Skinner, payable to Merriman twelve months after date, and assigned by Merriman to Maple before it became due. The note became due on the eighth of August, 1821. On the tenth of September following, Maple sued out of the office of the Franklin Circuit Court a writ of *capias ad respondendum* against Skinner, returned on the first Monday of October, which writ was returned *non est inventus*. On the sixth of Octo-

(a) 40 Ind. 461; 53 *Id.* 288.

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[*351] ber, an alias capias *issued returnable on the first Monday of March, 1822, which was returned executed, and judgment was rendered at the term for the plaintiff. Several executions were issued on the judgment and returned *nulla bona*. Maple, the assignee, then brought this suit and obtained judgment.

The complaint is, that due diligence was not used by Maple to obtain the money from Skinner. The liability of the assignor depends on the fact that the assignee, after having used due diligence, has failed to obtain the money of the maker of the note. Had the assignee, notwithstanding the delay, succeeded in bringing Skinner into Court at the first term after the note became due, the assignor would have had no ground of complaint; but as the assignor had parted with the note, and had no more control over it, he had a right to require evidence that the assignee had commenced suit in due time, and had used all the means in his power to obtain judgment at the first term; or that he should show some reason why an earlier proceeding was impracticable, or if practicable, that it would have been unavailing. A delay of upwards of thirty days, without any reason to justify or excuse it, is not, in our opinion, consistent with that due diligence which the law requires in such cases. If a man choose to sleep on his rights, he must do so at his own risk and not at the hazard of his neighbor.

Per Curiam.—The judgment is reversed with costs.

Wick, for the plaintiff.

Fletcher and Merrill, for the defendant.

HAGAMAN v. STAFFORD.

EVIDENCE—AUTHENTICITY OF AFFIDAVIT.—A paper, purporting to be an affidavit made before a justice of the peace in another county, was offered in evidence. *Held*, that there must be proof of its authenticity, in

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order to authorize its admission; but that it might be proved by parol evidence (a).

ERROR to the Owen Circuit Court.

HOLMAN, J.—Action on the case by a father for the seduction of his daughter, whereby he lost her service. Plea, not guilty. On the trial the daughter was introduced as a witness on behalf of the plaintiff, and [*352] stated in her evidence that the *child she had borne was begotten by the defendant at her father's in Greene county. In order to discredit her testimony, the defendant offered in evidence a paper, purporting to be an affidavit made by the witness before a justice of the peace of Greene county in a case of bastardy, in which it is said that she then swore that the defendant was the father of the child, and that it was conceived at Peter Hagaman's in Greene county. The plaintiff objected to the reading of this affidavit, because it was not authenticated by the certificate and seal of the clerk; but the Circuit Court, on receiving proof that the man before whom the oath appeared to be sworn, was, at the time of making the affidavit, an acting justice of the peace of Greene county, permitted it to be read in evidence without any proof, says a bill of exceptions, of the handwriting of the justice, or that he ever made the certificate. The defendant obtained a verdict. The plaintiff moved for a new trial. The Circuit Court overruled the motion, and gave judgment for the defendant.

The affidavit should not have been read without proof of its authenticity. It purports to be a part of a legal proceeding, before the justice of the peace, between the state and the present defendant; and being detached from the case is not entitled to the same credit as if the whole proceedings had been certified. Again, it purports to be the original affidavit, being nowhere spoken of in the record as a copy; and, being a document that should not

(a) 5 Blkf. 390; 49 Ind. 341.

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be thus removed from the office of the justice, its exhibition in this case for a purpose entirely foreign to that for which it was originally intended, and in a county different from that in which the justice resided, is calculated to excite suspicion. The party introducing it should, therefore, be held to the strictest proof of its authenticity; which, however, may be furnished by oral testimony.

Per Curiam.—The judgment is reversed, and the verdict set aside with costs. Cause remanded, &c. (1).

Naylor, for the plaintiff.

Merrill, for the defendant.

(1) A re-hearing was granted in this case; but the same judgment in it, as above, was afterwards rendered.

[*353] *MOORE, Administrator, v. MARTINDALE, Administrator.

PRACTICE—DEFAULT—ADMINISTRATOR.—If an administrator suffer judgment by default, he can not afterwards, by the common law, in an action against him suggesting a devastavit, plead plene administravit.

The statute of 1822, authorizing, under those circumstances, the plea of plene administravit, does not affect cases in which the judgment by default was suffered previously to the statute (*a*).

ERROR to the Wayne Circuit Court.

HOLMAN, J.—Declaration in debt, setting forth that on the 16th of July, 1821, Mordecai Mendenhall, recovered a judgment against William Young and Moses Martindale, administrators of the estate of Jesse Young, deceased, by default, for want of a plea; to be levied of the goods and chattels, lands and tenements of the deceased, in their hands to be administered; that Mendenhall died, and that administration of his estate was granted to the plaintiff; that he had the judgment revived in his own name as administrator, at the August term of the Circuit

(a) 3 Blkf. 275.

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Court, 1829, and execution awarded; that an execution issued and was returned *nulla bona*. He avers that, at the time the judgment was obtained, and at the time it was revived and execution awarded, there were assets in the hands of the defendants to the value of the judgment, which were afterwards wasted by the defendants. Young was not found. Martindale appeared and pleaded, that at the time he had notice of the debt, to wit, on the 10th of January, 1821, he had fully administered all the assets that came into his hands; and that he has received nothing since. Wherefore, he says he is not guilty of the waste charged in the declaration. To this plea the plaintiff demurred specially. The Circuit Court overruled the demurrer and gave judgment for the defendant.

It is admitted that if Mendenhall had followed up his judgment by execution, and had not found assets to satisfy it, he would have had, as the law then stood, a right of action against the defendant, on the suggestion of a devastavit; and that the defendant could not have been heard in any plea denying what, in legal intendment, was admitted by default, viz. that he had assets to discharge the judgment. The facts pleaded in the present action would not, under any form, have constituted [*354] a defence. But it is contended, that by the act of assembly, approved January the 2d, 1822, the law has been changed so as to remove the defendant's liability so far as to permit him to show he had no assets. This act provides that no mispleading, or lack of pleading, shall hereafter render any executor or administrator liable to pay any debt of the deceased, damages or costs, beyond the actual amount of assets, which shall or may come into his hands. Stat. 1822, p. 141. Without inquiring into the competency of the legislature to pass an act impairing the rights of Mendenhall or his representative, or diminishing the liability of the defendant, we are of opinion that they have not attempted to interfere in the case, but have left it just where it was.

Doe, on the Demise of Knapp and Wife v. Patterson and Others, in Error.

The act of assembly is prospective as to the mispleading or lack of pleading, as well as to the administrator's discharge from liability. By a fair construction it says that nothing that takes place hereafter, as to mispleading or lack of pleading, shall render the administrator liable beyond the assets; and says nothing about previous mispleading or lack of pleading, but leaves them with their consequences, under the operation of the law that prevailed at the time they took place. The law on this subject that was in force when the original judgment was entered, though its policy has been often questioned, has been too long and too well settled to admit of controversy. The judgment by default so fixed on the administrator the presumption of assets, to the amount of the judgment, that, in a subsequent action for a devastavit, he is estopped from denying that fact. This is the law that governs the case: of course the defendant's plea was inadmissible, and the demurrer should have been sustained.

Per Curiam.—The judgment is reversed with costs (1).

Smith, for the plaintiff.

Rariden, for the defendant.

(1) A re-hearing was granted in this case; but the same judgment in it, as above, was afterwards rendered. Vide R. C. 1831, p. 169. *Martindale v. Moore*, Nov. term, 1833.

[*355] *DOE, on the Demise of KNAPP and Wife, v. PAT-
TISON and Others, in Error.

HELD, that, by the statute-law of this state, a will, devising real estate must be in writing, signed by the testator, and attested by two credible witnesses in presence of the testator; and that it may in the same manner be revoked. *Held*, also, that a will in such a case, as well as a revocation, is valid without being sealed (1).

 Rawley v. The Board of Commissioners of Vigo County.

(1) A re-hearing was granted in this case; but the same judgment in it, as above, was afterwards rendered. The statute is now as follows:—"All devises and bequests of any lands or tenements, devisable by force of this act or any other law of this state, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by two or more competent witnesses, or else they shall be utterly void and of no effect." R. C. 1831, p. 272. Such devises can only be revoked by the burning, cancelling, tearing, or obliterating of the same by the testator himself, or in his presence and by his direction and consent; or by some other will or codicil in writing, or other writing of the devisor, signed in the presence of two or more competent witnesses declaring the same. *Ib.* The subsequent birth of a child, if there be no provision in the will for such a contingency, operates as a revocation of the will. *Ib.* p. 274.

 RAWLEY v. The BOARD of COMMISSIONERS of Vigo County.

FEES—CRIMINAL ACTIONS.—Neither the state, nor a county, is bound by law to pay the fees and charges of the officers, in cases of prosecutions on behalf of the state, in which the prosecution fails (*a*).

ERROR to the Vigo Circuit Court.

BLACKFORD, J.—The following statements of facts in this cause was submitted to the Court: "*Alpheus Rawley v. The Board of Commissioners of the County of Vigo.* Action of assumpsit. Damages, 55 dollars. The following is a statement of an agreed case for the decision of the Vigo Circuit Court, Indiana, between Alpheus Rawley, constable for Otter creek township, in said county, and the board of commissioners of said county. Rawley has performed services as constable, in state cases decided against the county, to the amount of 55 dollars, for which he claims an allowance from the said board of county commissioners; a part of which claim is embraced in his account filed, and which is to be made a part of the record. The only question submitted is, whether the county is liable to pay for such services.—*A. Kinney*, for plaintiff.—*J. Farrington*, for defendant."

Kipper and Others v. Glancey and Another.

—The Circuit Court, in this case, decided in favor of the defendant.

We have no doubt in this case. Neither the state, nor a county, is bound by law to pay the fees and charges of the officers, in cases of prosecutions on behalf of the state, in which the prosecution fails. There have been frequent cases of the kind in this Court; and we have uniformly refused to give costs against the state. It is settled in the Supreme Court of the United States that the United States never pay costs in any suit. *United States v. Barker*, 2 Wheat. 395. In the present case, the county can not be liable for the fees and charges stated, without an express statute on the subject. It is admitted that there is no such statute. The judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

Kinney, for the plaintiff.

Farrington, for the defendant.

KIPPER and Others v. GLANCEY and Another.

EQUITY—REMEDY OF CREDITORS.—If a person, indebted to several others, absent himself from the state, and leave real estate to which he is entitled in equity, but no property subject to legal process, the creditors may unite in a bill in chancery to have their claims liquidated, and to make the property liable for the amount (a).

SAME—PRACTICE.—The Court, on overruling a demurrer to a bill in chancery, should give the defendant a reasonable time to make and file his answer.

ERROR to the Shelby Circuit Court.

BLACKFORD, J.—This was a bill in chancery, filed by Joseph Glancey and John Kinsley, in the Shelby Circuit Court, against James P. Kipper, John Kipper, Samuel Kipper, and Nathan Bulkley. Each of the complainants set forth his separate demand, founded on contract,

(a) See 48 Ind. 75; 7 Id. 622.

Kipper and Others v. Glancey and Another.

against James P. Kipper. The bill charges that, in 1828, after the debts were contracted, James P. Kipper privately removed, with his personal property, to some [*357] place *out of the state unknown to the complainants. It states that, in 1824, this defendant paid 100 dollars for a tract of land in Shelby county, took the title in the name of one Stilwell, without his knowledge, and, in 1826, caused Stilwell to convey the land, without consideration, to Samuel Kipper. The bill further charges, that James P. Kipper purchased a lot in Shelbyville, made valuable improvements thereon, and afterwards, in 1825, caused the vendor to convey the same to John Kipper without the latter's knowledge. It charges, also, that James P. Kipper, in 1826, paid 100 dollars for a tract of land in the said county, and took the title in the name of John Kipper without his knowledge. The bill alleges, that James P. Kipper has the beneficial interest in this real estate, and that, to defraud his creditors, he caused the legal title to the property to be vested in Samuel and John Kipper, who are his trustees. The defendant, Bulkley, is charged to be the agent of James P. Kipper, and to have money in his hands payable to his principal, arising from the rents and profits of the trust-property. Fraud is charged against all the defendants. The bill prays that the real estate described be sold to satisfy the complainants; or that Bulkley be decreed to pay the debts out of the funds in his hands. This bill was demurred to. The Circuit Court overruled the demurrer, and gave the defendants leave to answer further, provided it was done *instantly*. The defendants applied for time to make and file their answer; but the Court refused to give them any time whatever to do so, without the complainants' consent. The defendants not answering *instantly*, the bill was taken *pro confesso*, and a final decree rendered for the complainants.

The objection made to this bill is, that the complainants are not judgment-creditors. It is the general doctrine,

certainly, that to reach the equitable interest of the debtor in real estate, by a suit in chancery, the creditor should first obtain a judgment at law; and to obtain assistance in equity as to personal property, both a judgment and an execution must be shown. *Brinkerhoff v. Brown*, 4 Johns. Ch. R. 671. One exception to this rule is, where the debtor is deceased. *Thompson et al. v. Brown et al.*, 4 Johns. Ch. R. 619. Of this class, was the case of *Sweeney et al. v. Ferguson*, May term, 1828, cited by the defendants in error (1). Another exception to the rule is, where the debtor has absented himself [358] *from the state. This is so decided in the case of *Scott v. M'Millen*, 1 Litt. 302. In this latter case, it is true, there was only one complainant. It seems to us, however, that the practice should not be confined to the proceeding by a single creditor; but that several may unite in the same bill, under the circumstances of the present case. This is permitted where judgments are previously obtained; *Brinkerhoff et al. v. Brown et al.*, 6 Johns. Ch. R. 139; or where the debtor is deceased. *Thompson et al. v. Brown et al.*, 4 Johns. Ch. R. 619. Where the debtor has absconded, the practice should be the same as in the cases to which we have referred. By absconding from the state, the debtor prevents the proceeding against him at law, and his creditors should be permitted to apply to a Court of chancery, as where judgments have been previously obtained, or the debtor is deceased. If the absconding debtor leaves property subject to legal process, the creditors may have their demands liquidated, and may procure their respective shares of the proceeds of the property, by means of an attachment. So, in our opinion, where the property left, and to be made liable, is equitable only, the creditors may unite in a bill in chancery to liquidate their claims, and to effect their common object of establishing the liability of the property. The objection to the bill, therefore, is insufficient, and the demurrer was correctly overruled.

 Roberts v. Lefavour, in Error.

The Circuit Court, however, committed an error in refusing to give the defendants in that Court any time whatever to make and file their answer, after overruling the demurrer. A reasonable time should have been given for that purpose.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

Stevens, for the plaintiffs.

Fletcher and *Merrill*, for the defendants.

(1) Ante, p. 129.

 ROBERTS v. LEFAVOUR, in Error.

LEFAVOUR brought an action against Roberts, before a justice of the peace, for 77 dollars, and obtained a judgment for *5 dollars and his costs. [*359]

Lefavour appealed to the Circuit Court, and obtained a judgment for the same amount with costs. *Held*, that under the statute of 1827, the judgment in the Circuit Court for costs was not erroneous.

The costs on the appeal are taxed, under the statute of 1827, in such a manner as the Court thinks proper (1).

(1) Vide R. C. 1831, p. 318.

 GLIDEWELL and Another v. M'GAUGHEY.

PRACTICE—DEMURRER.—On overruling a demurrer to a declaration, in an action on a penal bond conditioned for the performance of covenants, in which declaration the breaches are assigned, the order of the Court is, that the plaintiff ought to recover his said debt and his damages on occasion of the detention thereof; but that judgment should not be given until the truth of the breaches assigned is inquired into, and the damages are assessed (a).

(a) Post 457; 4 Blkf. 42; 6 Ind. 387.

 Glidewell and Another v. M'Gaughey.

SAME.—After this, if the Court, by agreement of the parties, have inquired into the damages, the opinion is given and entered, that the plaintiff has sustained damages, by reason of the breaches assigned, to the amount of—.

SAME.—The next and last steps to be taken are, the rendition of the final judgment for the debt in the declaration mentioned with costs; and the award of execution for the damages assessed with costs (*b*).

SAME—CAPIAS RESPONDENDUM—JOINT DEFENDANT.—If a *capias ad respondendum* be issued against two, and be executed on one only, the suit abates as to the other on whom the writ was not served; and no judgment can be rendered against him (*c*).

COSTS—BOND FOR—ACTION ON.—A declaration on a bond for security for costs, stating that the plaintiff sues for himself *and others, officers of the Court*, is bad. Any person interested may sue for himself on the bond, and obtain a judgment for the penalty; and, afterwards, any other person interested may, upon that judgment, have a *scire facias*. No one, however, has a right to sue for himself *and others, officers, &c.*

SAME—PLEADING.—It is not sufficient, in an action on such a bond, to state that the defendant has not paid the costs, without setting out the amount of the costs incurred.

ERROR to the Putnam Circuit Court.

BLACKFORD, J.—This was an action of debt by M'Gaughey, clerk of the Putnam Circuit Court, against Saunders and Glidewell. The declaration commences as follows: Arthur M'Gaughey, clerk of the Putnam Circuit Court, complains for himself and others, officers of said Court, who may be interested herein, of Henry Saunders and Robert Glidewell, in custody, &c., of a plea that they render unto the said M'Gaughey, clerk as aforesaid, and others, officers of said Court, who may be inter-
 [*360] ested *herein, the sum of 300 dollars, &c. The cause of action, as shown in the declaration, is a bond in the penalty of 300 dollars; the condition of which is set out substantially as follows: Whereas Saunders has instituted a suit in the Putnam Circuit Court against Boyd, now if the obligors or either of them pay the costs which may accrue in the case, then the bond to be void. The breach assigned is, that though the suit is determined,

(b) 3 Blkf. 499. (c) 7 Ind. 540.

the obligors have not, nor has either of them, paid the costs, but have always refused to pay, &c. The writ was executed on Glidewell, and returned as to Saunders, "not found." The record states that afterwards the parties came by their counsel, and the defendant filed his demurrer and the plaintiff his joinder. The demurrer is signed—Robert Glidewell, defendant. Among other causes of demurrer, the following are assigned: 1st, that the suit is commenced in the name of M'Gaughey and others, without naming those others; 2d, the amount of costs ought to be exhibited in the declaration. The Court overruled the demurrer, and gave judgment for the debt in the declaration mentioned. But as the amount due was unliquidated, the parties agreed that the same should be ascertained by the Court. Judgment was afterwards rendered by the Court in favor of M'Gaughey, against Saunders and Glidewell, for 26 dollars and 29 cents in debt, together with costs.

The proceedings in this case are very irregular. Supposing the demurrer to be correctly overruled, the judgment for the debt named in the declaration, viz., the penalty, should not have been rendered at the time it was. On overruling the demurrer, the order of the Court should have been, that the plaintiff ought to recover his said debt and his damages on occasion of the detention thereof; but that judgment should not be given until the truth of the breaches assigned are inquired into and the damages assessed. After this, it would have been proper to enter the agreement of the parties referring the assessment to the Court. When the Court had made the necessary inquiry, their opinion should have been given and entered—that the plaintiff had sustained damages, by reason of the breaches assigned, to the amount of 26 dollars and 29 cents. The next and last step to be taken was, the rendition of the final judgment for the debt in the declaration mentioned, with costs; and the award of execution [*361] for the damages assessed with costs. 1 *Saund.

Gildewell and Another v. M'Gaughey.

58; 3 Chitt. Pl. 280, 287; *Clark v. Goodwin*, July term, 1820 (1). If the irregularities just adverted to did not exist, the final judgment in this case, against both the defendants, would still be erroneous. The writ was returned as to Saunders, "not found." The record states, that afterwards the parties came by counsel, and the defendant filed his demurrer. The demurrer is signed by Glidewell alone. The fair inference is, that the parties who appeared were the plaintiff on one side, and the defendant Glidewell on the other. The suit must therefore be considered, by the return of the writ, abated as to Saunders; and no judgment could be rendered against him.

Independently, however, of the errors in the record subsequent to the overruling of the demurrer, the Court erred in their decision on the demurrer. The words, "for himself and others, officers, &c.," should not have been inserted in the declaration. The bond was given under the statute of 1824, as a security for costs. Any person entitled to recover on it had a right by the statute to put it in suit. The judgment for the penalty would stand as a security; and any other person entitled might sue out a scire facias on it. No one, however, had a right to claim both for himself and "others, officers," &c. The breach assigned in the declaration is defective. It was not sufficient to aver generally that the defendant had not paid the costs; but the amount of the costs for which the obligors were liable to the plaintiff, should have been shown. Lawes on Assumpsit, 230. These defects in the declaration are fatal.

Per Curiam.—The judgment is reversed, &c., with costs. Cause remanded, &c.

Wick, for the plaintiffs.

Whitcomb, for the defendant.

(1) Vol. 1 of these Rep. 74.

M'Clelland v. Hubbard.

M'CLELLAND v. HUBBARD.

EXECUTION—NOTES—TRUST.—A. deposited with B. a note for the payment of money against C., to be accounted for by B. to A. when collected. [*362] B. afterwards gave up this note to the sheriff to be *sold on a fee-bill against A., B. and D., in a case in which A. was the principal and B. and D. were his sureties. The sheriff, accordingly, levied upon and sold the note to satisfy the fee-bill. *Held*, that B., for this breach of duty, was liable to A. in action on the case.

Held, also, that a note for the payment of money is not liable to execution (a).

ERROR to the Tippecanoe Circuit Court.

BLACKFORD, J.—Trespass on the case by Hubbard against M'Clelland. The declaration contains two counts in trover for certain writings obligatory and promissory notes. There is also a count in case against the defendant as a bailee, for a breach of duty relative to certain instruments of writing. The defendant pleaded not guilty. The evidence in the cause was as follows: The plaintiff deposited with the defendant a note, and took from him the following receipt: "Received of Noah Hubbard one note on James Suit, calling for 80 dollars, for which I will account to the said Hubbard, when collected. June 20th, 1828.—*John M' Clelland*, (SEAL)." The plaintiff made a demand on the defendant for this note before the commencement of the suit. The clerk of the Circuit Court issued a fee-bill against the plaintiff and his sureties, on an appeal-bond, for costs, in the case of *William Digby*, appellee, v. *Noah Hubbard*, appellant, and *Reuben Kelsey* and *John M' Clelland*, his sureties. The sheriff, by virtue of the fee-bill, demanded property of the defendant, M'Clelland, one of the sureties in the appeal-bond. It was proposed to the defendant to give up the note mentioned in the receipt, which he refused, but asked of the sheriff time to consult on the subject. On the same day, the defendant handed over the note to the sheriff to be

(a) 4 Ind. 321.

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executed and sold on the fee-bill. Afterwards, and before the sale, the defendant gave notice to the plaintiff of these facts. A few days before the sale of the note, the plaintiff called on the defendant, and expressed a wish that the fee-bill might be paid off. He said that he preferred that Digby, the plaintiff in the fee-bill, should be made liable, and that he did not wish the defendant to suffer. He said also that the fee-bill was illegal, and that he would take some of the parties into chancery. There was proof of some other conversation of the plaintiff as to his request to Cox to pay off the fee-bill, rather than to have any more trouble. The note was sold at sheriff's sale to Kelsey, the highest bidder, for 14 dollars and 50 cents, and the money was paid by the sheriff into [*363] the clerk's office. *The case upon this evidence was submitted to the Circuit Court. The judgment is in favor of the plaintiff in that Court for the sum of 80 dollars in damages, together with costs. A motion was made for a new trial by the defendant below, which motion the Court overruled.

It is unnecessary to examine whether, in this case, there was such a conversion of the note to the defendant's use, as would subject him to an action of trover. The case is clear on the count charging the defendant as a bailee. The note was not liable to execution. Bingham on Judgments, 111 (1). The note was deposited by the plaintiff with the defendant for collection. The latter in giving it up to the sheriff committed a breach of his duty; and he is liable to an action on the case for his misconduct.

The motion for a new trial was correctly overruled. The judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

Fletcher and Merrill, for the plaintiff.

White, for the defendant.

Bowles v. Newby.

(1) By the writ of fieri facias, authority is given for the seizure and sale of every thing that is a chattel, belonging to the defendant, except his necessary wearing apparel. Even of two gowns one may be taken. Leases for terms for years, corn growing, and such "fructus industriales" as would go to the executor, fixtures which were erected and may be removed by the tenant, an annuity granted by the king for years, money in defendant's possession, are liable to execution under this writ; but not apples on trees, those fixtures, furnaces, &c. which belong to the heir, and may not be removed by the tenant, bank notes, money in the sheriff's hands, being the surplus of money levied under a former execution against the defendant's goods, at the suit of the same plaintiff, or damages recovered by the defendant against the sheriff in another action, or money levied under an execution at the suit of the defendant; nor goods pawned, demised for years, distrained, or taken and in custody of the sheriff, upon a former execution; nor things which can not be sold, as deeds, writings, &c. But goods pawned may be taken upon satisfaction of the pledge, and goods demised subject to the right of the lessee. *Bingh. on Judg. cited in the text.*

The above is the English law. For our statute on the subject, vide R. C. 1831, p. 234.

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*BOWLES v. NEWBY.

CONSIDERATION—FAILURE OF—PLEADING.—Assumpsit by the assignee of a promissory note, payable on the 30th of October, 1829, against the maker. Plea, that the payee and another, on the day the note was given, executed to the maker their obligation for the delivery of a certain quantity of bricks on the 1st of May, 1829; that the note was given in consideration of the delivery of the bricks; that the bricks had not been delivered, and the consideration of the note had therefore failed. *Held*, on demurrer, that the plea was a good bar to the action (a).

APPEAL from the Orange Circuit Court.

SCOTT, J.—Edmund Newby, assignee of Joseph Potts, brought an action of assumpsit in the Orange Circuit Court, against William A. Bowles, on a promissory note for 210 dollars, dated October the 30th, 1828, and payable twelve months after date. The defendant cravedoyer, and pleaded that Joseph Potts, to whom the said note was made payable, and one John Parvin, on the 30th of October, 1828, executed to him an obligation for the delivery of 70,000 bricks at said John Parvin's brick kiln in Paoli, on or before the first of May, 1829; that in

(a) 8 Blkf. 368; see 35 Ind. 527; 52 *Id.* 331; 14 *Id.* 177; 51 *Id.* 305; 49 *Id.* 146; 30 *Id.* 39.

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consideration of the delivery of the said bricks he gave the said note, &c., and avers that the bricks were not delivered. By reason whereof he says the consideration of the said promissory note has wholly and entirely failed. To this plea there was a demurrer, and judgment for the plaintiff; from which the defendant has appealed.

It is alleged in support of the judgment of the Circuit Court that the true consideration of the note for the money was not the actual delivery of the bricks, but the undertaking to deliver them. We are told that this is the true construction of the plea; and the Circuit Court so understood it; and from this construction of the plea, the conclusion is, that a failure to deliver the bricks was not a failure of the consideration of the note for the money. This construction of the plea being admitted, we think the conclusion does not follow. The bargain of every man ought to be performed as he understood it. *Ld. Raym.* 666; 2 *Saund.* 352, n. The time fixed for performance is a part of the contract. 1 *Pet. Rep.* 465. The time for the delivery of the bricks, in this case, being prior to the time for the payment of the money, [*365] shows clearly that it *was the understanding of both parties, that the delivery of the bricks should precede the payment of the purchase-money: and no person can compel another to perform his part of the contract until he himself has performed what he stipulated to do, as the consideration of the other's promise. 2 *Saund.* 352, n. This doctrine is established by a long train of decisions, and can not now be controverted. See 1 *Salk.* 112, 171; *Dougl.* 684; 4 *T. R.* 761; 8 *T. R.* 366. Most of these decisions are on contracts, where the mutual promises are contained in the same instrument; but we think they go clearly to establish the principle that where a promise is the consideration, a failure to perform that promise is a failure of consideration. This principle is fully considered and ably elucidated in the decision of the case of the *Bank of Columbia v. Hugner*, 1

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Pet. Rep. 455, above referred to. In that case it is said that if the seller is not ready and able to perform his part of the agreement on the day fixed for its performance, the purchaser may elect to consider the contract at an end. Had the note, in the case before us, expressed on its face the consideration set out in the plea, the plaintiff must have averred in his declaration, and proved on the trial, a delivery of the bricks, or a readiness to deliver them, in order to show a right of action. But, as the consideration does not appear on the face of the note, it may be shown by special plea under the statute, which authorizes the defendant to allege a want or failure of consideration. R. C. 1824, p. 295 (1). The note being in the hands of an assignee makes no difference; the statute making notes negotiable gives the same defence against the assignee as against the original payee of the note.

We have been requested to revise the case of *Pence et al. v. Smock*, decided at our last May term (2). We have carefully examined that case, and also the case of *Leonard v. Bates*, 1 Blackf. Rep. 172, and are fully satisfied of their correctness. These, and the decisions above cited, all rest upon the principle that the failure of one party gives to the other an election to consider the contract rescinded. The judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Hawk, for the appellant.

Dewey, for the appellee.

[*366] * (1) Accord. R. C. 1831, p. 405. *Wynn v. Hiday*, ante, p. 123, and note.

(2) Ante, p. 315.

PUGH v. BUSSEL.

INSOLVENT—DISCHARGE—FOREIGN STATE.—A debtor was discharged, under an insolvent law of Ohio, as to the imprisonment of his person,

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from a debt due to the payee on a promissory note. The parties resided in Ohio, and the debt was there contracted. *Held*, that the debtor might plead the discharge, so far as respected the imprisonment of his person, in bar of an action brought against him in this state on the note by an assignee thereof (a).

ERROR to the Rush Circuit Court.

SCOTT, J.—Debt by Bussel, assignee of Jackson, against Pugh, in the Rush Circuit Court. The suit is brought on a note, executed by Pugh to Jackson, when they both resided in the state of Ohio. The defendant pleads a discharge under the act of assembly of that state, for the relief of insolvent debtors, and claims the benefit of that discharge, as to his person, here. To this plea there is a demurrer, and the judgment is for the plaintiff.

The case presents but one question for our consideration: Is a discharge of the defendant, pursuant to the insolvent law of Ohio, a bar to an action, as to the defendant's person, in this state? The contract was made in Ohio; the parties to the contract were, at the time, both citizens of that state; the laws of Ohio gave effect to the contract, and by those laws its legal operation ought to be determined. If, by the laws of Ohio, the person of the defendant was discharged from any further liability to the plaintiff on that contract, his liability is not revived by his becoming a resident of this or any other state: but a discharge, good by the laws of the state where the parties both resided, and where the contract was made, is good everywhere. 1 Gall. Rep. 168. The assignment of the note by Jackson to Bussel does not affect the case; the assignee acquired all the rights of the assignor and no more. For these reasons, as well as from a consideration of the reciprocal obligations of the states, under the federal compact, we think the discharge of the defendant in Ohio is a good bar to an action here, as to his person.

The judgment, if any, ought to be of goods and [*367] *chattels, lands and tenements, only (1). This

(a) Post 394.

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in opinion is supported by the decisions of the Courts in Massachusetts, New York, Pennsylvania and Ohio. 1 Dall. Rep. 229; 2 Dall. Rep. 100; 5 Mass. Rep. 509; 2 Johns. Rep. 235, 363; 3 Binn. Rep. 201; 5 Binn. Rep. 332, 336; 1 Hamm. Rep. 236.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c. (2).

Smith, for the plaintiff.

Rariden, for the defendant.

(1) Form of the judgment in such a case: Therefore it is considered, that the said A. B. do recover against the said C. D. his damages aforesaid, by the said inquisition above found, and also—dollars for his costs and charges by him about his suit in this behalf expended; which said damages, costs, and charges, in the whole amount to—dollars; to be levied not on the person of the said C. D., but on his goods and chattels, lands and tenements, according to law. And the said C. D. in mercy, &c. Bingh. on Judg. 3-8.

(2) A re-hearing was granted in this cause, but the same judgment in it, as in the text, was afterwards rendered. Vide the same case, Nov. term, 1831, post.

JOHN and Another v. THE FARMERS AND MECHANICS' BANK OF INDIANA.

CORPORATION—FORFEITURE OF CHARTER—PLEADING.—A plea in abatement to an action by a corporation, that the charter is forfeited in consequence of a mis-user or non-user of the franchises, can not be good, unless it show the forfeiture to have been judicially declared at the instance of the government (a).

CORPORATION—NOTE—ESTOPPEL.—If a promissory note be given to a company as a corporation, the maker is estopped from contending that, at the date of the note, the company was not a corporation (b).

NOTES—GRACE.—A promissory note dated the 1st of July, 1826, payable to the President and Directors of the Farmers and Mechanics' Bank of Indiana, at their office of discount and deposit at Lawrenceburgh, on the 1st of July, 1829, is not entitled, under the statute, to days of grace; nor is it a paper in which the corporation is prohibited by its charter from holding an interest.

(a) 34 Ind. 506; 10 *Id.* 563; 5 *Id.* 77; See 16 *Id.* 46, 456.

(b) 10 Ind. 47; 8 *Id.* 392; 7 *Id.* 416.

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APPEAL from the Dearborn Circuit Court.

HOLMAN, J.—The President and Directors of the Farmers and Mechanics' Bank of Indiana filed their declaration in debt against John & Noble, on a promissory note for 200 dollars, dated the 1st of July, 1826, and payable to the President, &c., on the 1st of July, 1829, at the office of discount and deposit of the said President and [*368] Directors in Lawrenceburgh; averring a *demand of payment, at their office of discount and deposit in Lawrenceburgh, on the 1st of July, 1829, and a demand of the makers of the note on the 30th of August, 1829. Breach, that the defendants had not nor had either of them paid, &c. The defendants pleaded in abatement that, before the issuing of the writ in this case, the said President and Directors of the Farmers and Mechanics' Bank of Indiana had ceased to be, and were not a corporation in fact at the time the same was issued; the said corporation having long before that time ceased to elect their officers, and exercise their franchises, at the times and in the manner prescribed by their charter. To this plea there was a general demurrer, which the Circuit Court sustained. The defendants then demurred to the declaration, but their demurrer was overruled; and judgment was given for the plaintiffs. The defendants appealed to this Court.

In support of the plea in abatement, the appellants contend that the general averment in the plea, that the President and Directors had ceased to be, and were not a corporation in fact, being admitted by the demurrer, forms a substantive cause of abatement, without any reference to the subsequent averments in the plea; that it includes every possible way in which a corporation might cease to exist, except perhaps by the death of all its members; that if, when this action was commenced, the President and Directors were not in fact a corporation, no matter by what means they had lost their corporate existence, they were not entitled to this action; and that if this

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general averment is to be taken in connection with, and qualified by, the subsequent averments in the plea, still the averments are sufficient to show that the corporation is no longer in existence; that although, in general a non-user or mis-user of corporate powers for a short time, might not, when presented in this collateral way, be considered sufficient to show the non existence of the corporation, yet that a long neglect to elect its officers, and exercise its franchises, might be taken as an abandonment or surrender of its charter.

The first member of this argument is defeated by the clear distinction that exists between pleading the death of an individual and the dissolution of a corporation. In the case of an individual it is sufficient to aver his death.

The cause or manner of his death need not be [*369] averred. Not so with a corporate *body that has no natural existence, but which exists only by operation of law. The death of an individual is a simple fact. The dissolution of a corporation is a matter of law arising from facts; and the facts that lead to the legal conclusion that the corporation is dissolved, must be averred in the plea. The general averment in this plea, that the President and Directors had ceased to be, and were not a corporation in fact, when the writ was sued out, would not constitute a good plea. To give it a legal form it must be taken in connection with the subsequent averments which give the reasons for the general conclusion that they have ceased to exist as a corporation. Then, the validity of this plea rests upon the legal conclusion that is to be drawn from the fact that the President and Directors had, for a long time before the writ was sued out, ceased to elect their officers, or to exercise their franchises, at the times and in the manner prescribed by their charter. The mis-user or non-user here pleaded, is said to have existed for a long time: but if this time had no other limitation, it could not be

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presumed to run further back than the date of the note on which the action is founded; as it has been decided that the appellants, by contracting with the appellees as a corporation, are estopped from saying that they were not at that time a corporation. *The Dutchess Cotton Manufactory v. Davis*, 14 Johns. R. 238. See also, *Henriques v. The Dutch West India Company*, 2 Ld. Raym. 1532; *Hughes v. The Bank of Somerset*, 5 Litt. 45. But time, thus generally pleaded, is altogether uncertain and indefinite. No legal construction can extend the mis-user or non-user, averred in this plea, beyond an indefinite or mere point of time. And such a mis-user or non-user would not be sufficient to authorize proceedings for a seizure of the corporate franchises. *The People v. Runkel*, 9 Johns. R. 147. But this plea does not aver an absolute non-user of the franchises at any point of time, but a neglect to exercise them at the times and in the manner prescribed by the charter. In the case of *Slee v. Bloom*, 5 Johns. C. R. 366, as reviewed in the Court of Errors, 19 Johns. R. 456, it was determined that a neglect to elect the corporate officers for several years, a sale of all the property of the corporation, and an evident determination not to proceed in the business contemplated by their charter, amounted to such a surrender of the franchises as might be *taken advantage of by a creditor. But, taking this plea in its fullest extent, it shows no more than a mis-user or non-user of the franchises, which of itself has never been considered such a dissolution of a corporation as could be taken advantage of in a collateral way. If it amounts to a forfeiture of the corporate rights, that forfeiture must be judicially determined and declared, at the instance of the government, before it can be pleaded by an individual. *Trustees of Vernon v. Hills*, 6 Cowen, 23. See, also, the above cases of *Slee v. Bloom*, and *Hughes v. The Bank of Somerset*. The conclusion is that the plea is insufficient to abate the writ, and that the demurrer thereto was properly sustained.

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The appellants contend further that the declaration is insufficient to maintain the action; that the note declared on was entitled, under the act of assembly, to three days of grace, in like manner as an inland bill of exchange; and that the demand at the office of discount and deposit in Lawrenceburgh, on the day of payment mentioned in the note, was three days before the true day of payment; and that the demand, subsequently made of the payees personally, was not a compliance with the law, not being made at the place of payment mentioned in the contract. On examining the act of assembly on this subject, R. C. 1824, p. 330, and the decision of the Court of Appeals of Kentucky in *Stapp v. Anderson*, 1 Marsh, 535, on a similar act, we are of opinion that the note is not embraced in the provisions of the act, and is not entitled to days of grace. Nor is it a paper, as the appellants contend, in which the corporation is prohibited by its charter from holding an interest. It does not purport to have been an article of traffic; nor does it appear that the corporation traded for it. It is introduced by the President and Directors as evidence of a debt due to them by the appellants; and there is nothing in that clause of their charter, by which they are restrained from trading in anything but bills of exchange, &c., that prohibits them from taking a note, or any other instrument of writing, to secure the payment of a debt. In the case of *The Bank of the United States v. Norton*, 3 Marsh. 422, it was decided that a restraining clause in the charter of the Bank of the United States, similar to the clause under consideration, did not prohibit that bank from pur-

chasing a promissory note, and receiving it by [*371] assignment, and *maintaining an action upon it.

But here there was no purchase in any sense of the term. The note is only evidence of a promise to pay money, presumed to be due from the payees, which promise was susceptible of proof by other evidence, if the note had not been given.

SCOTT, J. was absent. (436)

The State *v.* Peden, in Error.

Per Curiam.—The judgment is affirmed, with 2 *per cent.* damages and costs.

Dunn and *Caswell*, for the appellants.

Stevens and *Stapp*, for the appellees.

THE STATE *v.* PEDEN, in Error.

AN indictment charged the defendant with having, by shooting, maliciously wounded and injured a young mare, the property of A., of the value of 80 dollars. *Held*, that the indictment was bad, under the statute, for not stating the amount of damages occasioned by the injury complained of.

YANDES and Another *v.* LEFAVOUR and Another.

PARTNERSHIP—PAYMENT—RELEASE BY.—Payment of a debt to one partner of a firm is good against the other partners; and a release by one partner to a debtor of the firm is obligatory on the others.

SAME—EVIDENCE—ADMISSION.—Assumpsit in the name of A. and B. against C., for work and labor performed by the plaintiffs as partners. The defendant offered to prove admissions, made by one of the plaintiffs after the partnership was dissolved, tending to show that after the dissolution, the parties had made a different contract respecting the payment for the work than that under which the work had been done. *Held*, that the evidence was inadmissible (a).

SAME—ADMISSION BY.—The admission of one partner as to the existence of a debt against the firm, made subsequently to the dissolution of the partnership, is not binding on the other partners.

SAME.—An acknowledgement of a debt, made by one partner after a dissolution of the partnership, is not sufficient to take a case out of the statute of limitations as to the other partners.

APPEAL from the Marion Circuit Court.

(a) 3 Blkf. 433; 2 Ind. 322; 6 *Id.* 304; 12 *Id.* 223.

Yandes and Another v. Lefavour and Another.

HOLMAN, J.—Assumpsit, in the name of Lefavour and Shryock against Yandes and Wilson, late partners [*372] in business, for *work and labor. The first count is a general indebitatus assumpsit, the second a quantum meruit. The gist of the action is, that the plaintiffs had jointly performed for the defendants work and labor as mill-wrights, for which they were to be paid the current price. This appears to have been the only joint concern in which the plaintiffs had been engaged. On the trial in the Circuit Court, the defendants offered in evidence a letter written by Shryock, several years after the termination of this joint undertaking, and a few days after this suit was instituted, in which he disclaims all interest in the suit, and states that he and Lefavour did not complete the whole of the work they had undertaken, and, in consequence thereof, agreed with the defendants to receive pay for what they had done by the day; each to receive his pay separately for the number of days he had worked; that, in consequence of this agreement, the defendant, Yandes, paid him for the time he had worked; and that Lefavour was to receive his pay in the same manner. Agreeably to a former decision of this Court, so much of this letter as stated the amount that Shryock had received on this contract was admitted in evidence, and the other parts were rejected.

There are two objects for which the appellants claim the right of reading the whole of this letter. The first is to show that, by a subsequent agreement, the joint concern of the appellees was so dissolved that a joint action will not lie for any balance that may be due on the original contract; and secondly, to show that the original contract was changed from a quantum meruit to a payment per diem. We think the letter was inadmissible for either of these purposes. It is admitted that payment to one partner, or one member of a joint concern, is binding on the others; and by the same rule a release or acquittance by one might be obligatory on the others. But

the question here is different. The admissions of Shryock go to set up a new contract; and if he was incompetent, at the time he made the admissions, to execute a new contract that would bind Lefavour, it would seem to follow that his admissions were incompetent to prove that a new contract had been made.

We consider the principle settled, on American authority, that, after the dissolution of a partnership, one partner can not bind another by the admission of [*373] a debt. In *Hackley v. Patrick*, *3 Johns. R. 536, it was decided that, after the dissolution of a partnership, the power of one partner to bind the others wholly ceases; that there is no reason why his acknowledgment should bind his co-partners, any more than his giving a promissory note in the name of the firm. And, in that case, the acknowledgment was made by the partner who was authorized to settle the partnership accounts. The same principle was recognized in *Walden v. Sherburne*, 15 Johns. R. 409. It has also been so decided in Kentucky. *Walker v. Duberry*, 1 Marsh. 189. And the doctrine of these cases is supported by the Supreme Court of the United States. *Bell v. Morrison*, 1 Peters, 351. We also consider that the principle is substantially settled, that the acknowledgment of one partner will not take a case out of the statute of limitations. See an exposition of the cases on this question in the above-cited case of *Bell v. Morrison*. In that case the position seems to be correctly taken, that a promise that takes a case out of the statute, is not a mere continuation of the original promise, but a new contract springing out of, and supported by, the original consideration. "And if so," continues Judge STORY, who delivered the opinion, "as after the dissolution no one partner can create a new contract, binding upon the others, his acknowledgment is inoperative and void as to them." 1 Peters, 371 (1).

Taking it then as the law that one partner or joint contractor, after the joint engagement is at an end, can not

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make a new contract that will be obligatory on his partner, we are unable to discover any good reason why his admissions should be received to prove a new contract; or how this general principle is affected by the relative position of the parties, as being plaintiffs or defendants. We therefore think the Circuit Court acted correctly in rejecting the evidence.

There was a verdict for the plaintiffs, a motion for a new trial which was overruled, and a judgment on the verdict. On looking into the evidence, all of which is set forth in a bill of exceptions, it appears to us that the jury must have made a mistake in the amount of their verdict, and that a new trial ought to have been granted. We think there is no proof of the items set down by Lefavour, on the bill made out by Sacket, and are at a loss to know how the jury disposed of the payment about which Justice FOOTE testified.

[*374] **Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Fletcher, Merrill and Gregg, for the appellants.

Brown and Wick, for the appellees.

(1) "It has been repeatedly held in this Court, that though one partner, after the dissolution, can not bind the other by any new contract, yet his acknowledgment of a previous debt due from the partnership, will bind the other partner, so far as to prevent him from availing himself of the statute of limitations." Per SUTHERLAND, J. *Patterson v. Choate*, 7 Wend. 445. An acknowledgment within six years, by one of two makers of a joint and several note, revives the debt against both. *Whitecomb v. Whiting*, Doug. 652; *Perham v. Raymull*, 9 Moore, 566; *Pritchard v. Draper*, 1 Russ & Mylne, 191. The declarations of one partner may be proved in order to affect the other partner's right in a partnership affair, although touching matters which have occurred since the dissolution of the partnership, namely, the subsequent payment of a partnership demand. Per BROUGHAM, C. *Pritchard v. Draper*, supra. Vide *Lefavour et al. v. Yandes et al. ante*, p. 240; 9 Kent's Comm. 2d ed. 49.

M'CREARY v. FIKE.

PRACTICE—DEMURRER TO EVIDENCE.—A party does not, by cross examining his opponent's witness, preclude himself from the right of demurring to the evidence.

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SAME.—If a demurrer to parol evidence contain all the evidence given, a joinder in demurrer may be demanded.

SAME.—When a demurrer to evidence is allowed, the jury may assess the damages conditionally; or they may be discharged without making such an assessment: in the latter case, should the demurrer be overruled, the damages may be assessed by another jury on a writ of inquiry (a).

SAME.—If, from the testimony set out in a demurrer, to the plaintiff's evidence, the jury might have inferred that the action should be sustained, the plaintiff is entitled to a judgment in his favor (b).

ERROR from the Marion Circuit Court.

BLACKFORD, J.—This case originated before a justice of the peace. Several statements of the demand were filed, which are designated in the record by the letters B, C, D, E, and F. Statement B is a transcript from the docket of Justice BEELER, showing a suit by M'Creary, assignee of Fike, against Thompson, on two sealed notes, due in December, 1829. Statement C is an amended statement, alleging that the notes filed as a cause of action, were assigned by Fike to the plaintiff, in consideration of a wagon and oxen; that, after the assignment, the plaintiff discovered that Thompson, the maker, was an [*375] infant, and *would plead his infancy in bar to a suit on the notes; and that, on the plaintiff's mentioning this to Fike they made a new contract; this contract was, that the plaintiff should sue on the notes, and Fike be liable for the costs in case of failure; that Fike should pay 100 dollars for the wagon and oxen, and deduct from the amount whatever he might recover from Thompson. The plaintiff avers that he sued on the notes; and that Thompson, having pleaded infancy and fraud, obtained judgment. Statement D is four sealed notes given by Thompson to Fike, and assigned by the latter to the plaintiff. Two of these were due in December, 1829; the others, in December, 1831. Statements E and F relate to costs and other charges not necessary to be par-

(a) 48 Ind. 100; 42 *Id.* 294; 8 *Id.* 264. (b) 60 Ind. 172.

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ticularly noticed. To these statements of demand, the defendant pleaded non-assumpsit; and also, that the plaintiff owed him a certain sum for a mare sold and delivered. On the trial before the justice, the plaintiff recovered a judgment. The defendant appealed to the Circuit Court.

To prove his case, on the appeal, M'Creary introduced several witnesses; some of whom were cross-examined by the defendant. The evidence tended to show the new contract to be, that M'Creary was to sue Thompson on the two notes which were due; and that a failure in such suit on the ground of fraud, or the maker's infancy, should establish the liability of Fike as averred in the statements of the demand. The transcript from the docket of Justice Beeler, of the suit against Thompson on the notes due, showing a judgment for Thompson with costs, was given in evidence. There was parol proof, that Thompson's defence in the cause was infancy and fraud; and there was evidence tending to show that the defendant had a demand for the price of the mare mentioned in the plea. The defendant, having set out the whole of the evidence, proposed to demur to the same, and requested that the jury might be discharged. The plaintiff objected to the demurrer; but the Circuit Court admitted it, and ruled the plaintiff to join. A joinder was filed, and the jury discharged. The defendant obtained judgment on the demurrer.

The plaintiff, M'Creary, complains of this judgment on these grounds: 1st, that the defendant, after cross-examining the witnesses, could not demur; 2d, that the plaintiff could not be compelled to join in demurrer; [*376] 3d, that the jury was illegally *discharged; 4th, that the evidence authorized a judgment for the plaintiff. The first two objections are not tenable. The practice is well settled that the defendant, under the circumstances of the case, had a right to demur, and the plaintiff was bound to join in demurrer. There is no

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foundation for the third objection. The discharging of the jury was not erroneous. In these cases, there are two modes of proceeding. Whenever a demurrer to evidence is allowed, the jury may assess the damages conditionally; or they may be discharged without such assessment. In the latter case, should the demurrer be overruled, the damages may be assessed by another jury on a writ of inquiry. 1 Arch. Pr. 209.

On the fourth objection, the plaintiff must succeed. The defendant, to support the judgment, contends that the contract set out in the statement of the demand differs from the one proved; the former showing that all the notes were to be sued on; the latter, that it was necessary to sue on the two only which were due. This position of the defendant is not sustainable. The several statements of the cause of action relative to what notes were to be sued on, are, when taken together, consistent with the proof. The notes alluded to in the statement marked C must have reference to the two notes which were due, and which are described in the previous statement marked B. The description of the cause of action, and the evidence, both show that the defendant's liability to the plaintiff depended on the result of a suit against Thompson on the notes due in December, 1829. This evidence relative to the notes to be sued on, together with the other testimony given in the cause, conduced to prove all the facts necessary to support the action. Whether, from the evidence set out in the record, a jury would have found for the plaintiff, is not for the Court to decide. There was proof from which a jury might have inferred that the action should be supported; and that was sufficient for the plaintiff. It is our opinion, therefore, that the judgment of the Circuit Court on the demurrer to evidence should have been in favor of the plaintiff.

Per Curiam.—The judgment is reversed, &c., with costs. Cause remanded, &c. (1).

Brackenridge, Administrator, *v.* Holland and Others.

Brown, for the appellant.

Fletcher and *Merrill*, for the appellee.

[*377] *(1) A re-hearing was granted in this case; but the same judgment in it, as above, was afterwards rendered.

BRACKENRIDGE, Administrator, *v.* HOLLAND and Others.

DECEDENT'S ESTATE—SETTLEMENT—REVIEW.—The jurisdiction of a Court of Chancery extends to the accounts of administrators, though settled in the Probate Court, if there be evidently a mistake or fraud in the settlement (*a*).

TRUSTEE—PURCHASE OF TRUST PROPERTY.—A trustee, no matter how or from whom he delivers his authority, can not purchase the trust-estate so as to make a profit to himself. He is not prohibited from purchasing; but his purchase, when made, is for the benefit of the *cestui que trust* who may, if he apply within a reasonable time, have a re-sale. If the property be offered for sale a second time, and there be no advance, the trustee is held to his purchase.

SAME.—If an administrator, authorized by an order of Court to sell, at public sale, the real estate of his intestate for the payment of debts, purchase the land himself at the sale, and afterwards sell the same at an advanced price, he is liable to account for the profits to the heirs, for whose benefit the administrator's purchase must be considered to have been made. And the effect is the same, whether the purchase be made by the administrator alone, or jointly with another; or whether it be made in person or by an agent (*b*).

SAME—AMOUNT OF LIABILITY.—If, owing to the conduct of the administrator, any uncertainty exists as to the amount of the profits made by him on the purchase, he will be chargeable with the largest amount which, from the circumstances, he can be presumed to have realized.

SAME.—It is a rule, both at law and in equity, that if a person having charge of the property of another, so confounds it with his own that it can not be distinguished, he must bear all the inconvenience of the confusion; and, if it be a case of damages, the damages given against him will be to the utmost value of the property.

ERROR to the Franklin Circuit Court.

HOLMAN, J.—The heirs of John Holland, deceased, filed their bill in chancery, stating that their father in his life-

(*a*) Ante, 343; 12 Ind. 381.

(*b*) 51 Ind. 292; 20 Id. 193; 21 Id. 80; 12 Id. 266; 49 Id. 114.

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time, about the 1st of November, 1817, purchased of Robert and Joseph Brackenridge, a tract of land for the sum of 2,490 dollars; of which he then paid 600 dollars, and was to pay the balance by installments, for which he executed several notes, bearing interest from the date, the last payment to be made in six years; that their father died in 1818, and administration of his estate was committed to Joseph Brackenridge and George L. Murdock; that the administrators received large sums of money for the personal property, and for debts due to the decedent, which, with the annual profits of the land, would have enabled them to pay off the notes for the purchase-money of the land as they became due; there being [*378] no other debts of any *considerable amount against the decedent; that, notwithstanding this, Brackenridge, in the absence of Murdock, filed an affidavit in the Probate Court, stating that the personal estate was insufficient to pay the debts, and thereby procured an order of the Probate Court, in June, 1819, for a sale of the land; that he made no return of his proceedings under said order; but, from a deed in the recorder's office, it appears that Robert and Joseph Brackenridge, on the 20th of August, 1819, conveyed the said land to Piatt, Grandon and Armstrong, in consideration of 2,500 dollars; that by the records of the Probate Court of the 25th of February, 1823, it appears that the administrators made a settlement of the accounts in that Court; and, in the account then exhibited, the estate is credited by 1,600 dollars as the price of the land, instead of the sum of 2,500 dollars; that, from this settlement it appears that there was then in the hands of the administrators the sum of 209 dollars and 86 cents; but the bill charges that this settlement did not embrace the moneys received by Murdock, and was not a correct account of the moneys received by Brackenridge. The bill further charges that Murdock has received and wasted moneys belonging to the estate to the amount of 600 dollars, and

states that in 1826, Joseph Brackenridge died, and Robert Brackenridge was appointed his administrator. Robert Brackenridge and Murdock are made defendants. The bill prays for a full account of the administration, and that the estate of Joseph Brackenridge, in the hands of Robert Brackenridge, may be charged with the 2,500 dollars for which the land was sold.

Robert Brackenridge pleaded, in bar of the action, the settlement made in the Probate Court by Joseph Brackenridge. To this plea there was a demurrer, which was sustained by the Circuit Court. He then answered; and his answer admits the sale of the land to Holland, but states that a large quantity of personal property was included in the contract. He states that he does not know the value of the personal estate, or the manner in which it was administered, but by reference to the account rendered by Joseph Brackenridge in the Probate Court, which he believes to be correct; that the land was sold, by virtue of the order of the Probate Court, at public auction; that the sale was fair; that he and his partner,

Joseph Brackenridge, became the purchasers at [*379] the sum of 1,600 dollars, which, *he avers, was the full value; and that they made the purchase for themselves, and not for the benefit of the heirs. He admits that he and his partner sold the land to Piatt, Grandon, and Armstrong, and that the consideration that is expressed in the deed is 2,500 dollars; but he says that that was not the real consideration, as the land was exchanged, with other real property, for a lot of merchandise estimated at 6,000 dollars; and that he does not believe it would have sold for 1,600 dollars in cash.

Murdock answered, and, with some account of his separate administration, denies taking any part in the settlement in the Probate Court; stating that it was made without his knowledge, and that he had no hand in receiving or disbursing any part of the estate set forth in that account. He denies having any concern in the sale

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of the land; and states that, being about to leave the state, his co-administrator expressed an opinion that the estate was perfectly solvent, and that he was willing to take back the land in discharge of the debt due from the estate to himself and partner; and that during his absence the land was sold.

We learn from the depositions, that Holland, when he purchased the land, received with it, of R. and J. Brackenridge about 500 dollars worth of personal property, which formed a part of the contract; that 1,600 dollars was a high price for the land, at the time it was purchased by R. and J. Brackenridge in 1819; but that no material variation had taken place in the value of the land between the years 1817 and 1819. The order of the Probate Court shows, that the Court fixed the terms of credit, the day and place of sale, and ordered their clerk to make out advertisements, &c. The auctioneer testifies that the sale was public, that a large collection of people were present, that the land was cried for a long time, and was bid off by John Shanks for R. and J. Brackenridge. Grandon, one of the firm, to whom R. and J. Brackenridge sold the land, states that it was purchased by them, with other real property, in a contract for merchandise; that the only reason why they purchased the land was, that they had a large quantity of merchandise, and were anxious to dispose of it. Murdock's deposition was taken, in which he makes some charges against his co-administrator of moneys not accounted for, and repeats the statement in his answer *that his co-administrator expressed a willingness to take back the land in discharge of the debt to himself and partner.

On the final hearing of the cause, the Circuit Court entered a decree against Robert Brackenridge, as administrator of Joseph Brackenridge, for the sum of 569 dollars and 62 cents, with interest from the 25th of February, 1823, amounting in all to 808 dollars and 86 cents, to be levied of the goods, &c., of his intestate; and a decree

against both of the defendants, for 104 dollars and 25 cents principal and interest, being a sum for which the estate of Joseph Brackenridge and Murdock were jointly liable; and postponed the account of the separate administration of Murdock for further consideration. From this decree, Brackenridge alone appealed to this Court.

Two leading questions are presented for our determination. The first regards the jurisdiction of a Court of chancery, to inquire into a settlement of an administration account in the Probate Court. The second, the right of an administrator to purchase lands which he, as administrator, is authorized to sell.

The first has been settled, at the present term, in the case of *Allen v. Clark*. It is there determined, that the settlement in the Probate Court is to be taken as *prima facie* correct, but is not conclusive; that, on a proper case being made, the account may be re-examined in a Court of chancery. Here, the disposition of the land presents a case that more particularly requires the interposition of a Court of chancery.

The second question seems also to be settled. A trustee, no matter how or from whom he derives his authority, can not purchase the trust-estate so as to make a profit to himself. There is no general rule that he shall not be a purchaser; but if he is, his purchase is for the benefit of the *cestui que trust*. If the trustee to sell becomes a purchaser, however fair the transaction, it is subject to an option in the *cestui que trust*, if he comes in a reasonable time, to have a re-sale. *Campbell v. Walker*, 5 Ves. 678. If it is offered for sale a second time, and there is no advance of price, the trustee is held to his purchase. *Lister v. Lister*, 6 Ves. 631. Where the sale was effected through the medium of a trustee, and he became the purchaser, though without fraud, and by auction, the sale was set aside; the circumstance of its having been by auction made no difference. *Sanderson v. Walker*, 13 Ves.

[*381] 600. A trustee is not permitted *to purchase a

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mortgage, or judgment, that is a lien on the trust-estate for his own benefit. *Green v. Winter*, 1 J. C. R. 27. An executor, acting with regard to the testator's property in any other manner than the trust requires, is answerable to the *cestui que trust* for any gain, and liable for any loss. *Piety v. Stace*, 4 Ves. 620. In Maryland, an administrator or executor can not purchase at his own sale, and the confirmation of such purchase in the Orphans' Court does not preclude the Court of chancery from setting it aside. *Conway v. Green*, 1 Har. & J. 151. In North Carolina, an executor is not permitted to become a purchaser in a sale made by him as executor, notwithstanding such sale be public, necessary, fair, and for a full price. *Ryden v. Jones*, 1 Hawks. 497. In South Carolina, the same principle is maintained to a general extent. *Perry v. Dixon*, 4 De-sauss. 504. The three last cases are given on the authority of 3 Wharton's American Digest, 276, 278. The case of *Guier v. Kelly*, 2 Binn. 294, cited by the counsel for the appellant, accords in principle with these decisions. A contrary doctrine seems to prevail in Virginia; but we think from the foregoing cases, and many more that are in accordance with them, that the purchase made by R. and J. Brackenridge, under the order of the Probate Court, must be considered as made for the benefit of the heirs. The circumstances of the time, place, terms of credit, and manner of giving notice of the sale, being regulated by the Probate Court, does not materially change the case, as much was still left in the power of the administrator; and he might have exerted an influence on the sale that lies beyond the ordinary means of detection. The object of the rule is to banish from his mind all thought of speculating on the trust-estate. A method is suggested in the books, whereby he might legally become the purchaser. If the land was publicly exposed to sale, and he was willing to go beyond the highest bid, he might postpone the sale, file a bill, or report the fact to the Court from whence he derived his author-

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ity; showing the amount of the highest bid, and that he was willing to give more. The Court might order that he should have the land. *Daroue v. Fanning*, 2 J. C. R. 261; *Campbell v. Walker*, 5 Ves. 678.

This case is not altered, in principle, by Robert Brackenridge uniting with the administrator in the purchase, nor by the land *being bid off for them by Shanks; for the rule extends to a purchase made by a trustee for another person; *ex parte Bennett*, 10 Ves. 381; and to a purchase made by a third person for the wife of the trustee. *Daroue v. Fanning*, 2 J. C. R. 252. In this last case, the executor was authorized to sell lands to raise legacies for the testator's children, of whom the wife of the executor was one. The executor and his wife authorized a third person to purchase in trust for the wife. After the purchase, large improvements were made on the land. Chancellor Kent, after reviewing a long train of uniform decisions on the subject, ordered a re-sale: the land to be set up at a sum which included the price of the former purchase and the value of the improvements; and, if it would not sell for more, the purchase to stand, but if it sold for more, the former sale to be vacated. The rule mentioned in some of these cases, that the *cestui que trust* must apply in a reasonable time to have a re-sale, or the purchase will be considered valid, does not apply in this case. Most of the heirs are still minors, whose interest is seldom affected by lapse of time; besides, the sale of the land by R. and J. Brackenridge to Piatt, Grandon and Armstrong, in less than two months after the purchase, and before any report was made of the proceedings under the order of sale, precluded the heirs from demanding a re-sale. In such a case, the rule is, that the trustee shall account for all the profits he has made. One of several trustees having purchased the trust-property, and afterwards sold it at a profit, was decreed to account for that profit. *Whitchote v. Lawrence*, 3 Ves. 740. In *Randall v. Errington*, 10 Ves. 422, there was a fair sale,

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and the trustee purchased at auction for a full price, yet as he had sold a part at some profit, the Court opened the sale, at the instance of the *cestui que trust*, as to the parts unsold, and compelled the trustee to account for the profits on the parts he had sold. An executrix suffered land, of which the testator died seized, to be sold under a mortgage, and became the purchaser in her own right, and afterwards sold it; and she was held accountable to the heirs for the proceeds of the sale. *Evertson v. Tappen*, 5 J. C. R. 497 (1).

The most serious difficulty in this case is to determine the amount of profits made by R. and J. Brackenridge in selling this land to Piatt, Grandon and Armstrong. The consideration in the deed is 2,500 dollars, which [*383] is 900 dollars more than the *price of the first sale; but the land was exchanged with other property, for a lot of merchandise. This difficulty, however, arises from the act of the administrator, and he is chargeable with all the inconveniences that have resulted from that act. The rule both in law and equity is, that if a person having charge of the property of another so confounds it with his own that it can not be distinguished, he must bear all the inconvenience of the confusion. If it be a case of damages, damages will be given against him to the utmost value of the articles. *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 J. C. R. 62; *Armory v. Delamirie*, 1 Strange, 505. This rule, applied in all its strictness, would charge the administrator with the nominal amount stated in the deed as the consideration of the conveyance, unless he could show that the consideration was a less sum. And, although that sum was received in merchandise, the case would not be altered, unless it was clearly shown that there was a difference between that amount in merchandise and in cash, and what that difference was. There are some other facts in the case that have a remote bearing on this question. A short time before the sale of this land by the administrator he ex-

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pressed to his co-administrator a willingness to take back the land in discharge of the original purchase-money, which then amounted to near 2,000 dollars, which would have allowed the estate of Holland nearly 400 dollars more than he has accounted for. This land was purchased by Holland of R. and J. Brackenridge in 1817, for 1,990 dollars, allowing 500 dollars as the price of the personal property, and supposing 500 dollars of the money advanced by Holland were to pay for the personal property. Then, 100 dollars were advanced for the land. For the balance a credit was given, but it bore interest from the time of the purchase. Then, at the time of the administration sale, the amount due for principal and interest, together with the sum advanced, was but little short of 2,200 dollars; which was the sum that the heirs of Holland might be said to be paying, and R. and J. Brackenridge receiving for the land, at the time they bid it off at 1,600 dollars, and at the time they sold it, as they say, for the nominal consideration of 2,500 dollars; and we learn that no material variation in the price of the land had taken place between the time when Holland purchased and the time of the sale to Piatt, Grandon and Armstrong. We *mention these circumstances, not as presenting any definite criterion of the profit made by the administrator, but to show that he has but little reason to complain of the decree of the Circuit Court.

There is so much obscurity in the accounts of both the administrators as to their separate and joint administration, that we are not able to discover the precise data upon which the Circuit Court predicated its decree; but this is unimportant, as we are fully satisfied that the separate decree against Brackenridge, from which alone it is presumed he appealed, is authorized by the facts in the case, and must be affirmed.

Per Curiam.—The decree is affirmed, with 2 per cent. damages and costs.

Porter v. Brackenridge.

M'Kinney and Caswell, for the plaintiff.

Morris, for the defendant.

(1) Vide *Whelpdale v. Cookson*, 1 Ver. sem. 9. Same case stated more at large, Belt's Supp. 7. "Although there is no positive rule, that a trustee to sell shall not, in any case, be himself the purchaser, inasmuch as he is not precluded from entering into a new contract with his *cestui que trust*, yet he is not permitted in any other case to make a profit to himself. *Whichcote v. Lawrence* 3 Ves. jun. 740. Upon which see Ld. Eldon C.'s observations, 6 Ves. 626.

The purchase in *Coles v. Trecothick*, 9 Ves. 234, was supported upon the ground of a distinct and clear contract with the *cestui que trust*, he having the fullest information, and having the sole management; the trustee being passive as to the latter circumstances. *Fox v. Mackreth*, 2 Bro. 400, and affirmed on appeal in Dom. Proc. 1791, is considered as a leading case in support of the rule that a trustee for sale shall not take advantage of his situation so as to purchase for his own benefit.

To set aside such a purchase, it is not incumbent upon the party to show that the trustee has made an advantage, 8 Ves. 348; but it is in the choice of the *cestui que trusts* to judge for themselves whether they will take back the property or not, 6 Ves. 627; so that in such a case the trustee can never be allowed to retain an advantage, but may suffer a loss. *Lister v. Lister*, 6 Ves. 631.

This doctrine is not confined to trustees, but extends to assignees under commissions of bankrupt, solicitors, agents, and in short all persons having a confidential character. *Ex parte Lacey*, 6 Ves. 625; *Ex parte Hughes* and *Ex parte Lyon*, ib. 617; *Ex parte Attwood and Owen v. Foulkes*, cited ib. 630, note b; *Ex parte James*, 8 Ves. 337. See *M'Enzie v. York Buildings Company*, Dom. Proc. cited 6 Ves. 630. The principle being as above, it seems that the sale being by auction makes no difference. See 8 Ves. 348; *Nelthorpe v. Pennyman*, 14 Ves. 517." Belt's Supp. 10, 11.

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PLEADING—DUPLICITY.—Debt against the administrator of A. on a joint and several bond executed by A. and B. to the plaintiff, conditioned for the performance of covenants. Plea, that the intestate was only a surety; that the plaintiff had agreed with B., without the defendant's knowledge, to take a judgment by confession against B. for 275 dollars, in a suit on the bond then pending against him, it being a less sum than the plaintiff pretended he could recover; and to take a judgment against the present defendant for the costs of an action then pending against him on the bond; that judgments had been rendered conformably to this agreement. *Held*, that this plea was not double; and that it was a good bar to the action.

SAME.—A plea, to be objectionable for duplicity, must contain more than one valid defence to the suit (a).

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ERROR to the Franklin Circuit Court.—Debt by Porter against Brackenridge, administrator. Special plea in bar. Demurrer to the plea, and judgment for the defendant.

BLACKFORD, J.—This was an action of debt on a joint and several bond in the penal sum of 1,000 dollars, executed by one Van Camp and the defendant's intestate, and conditioned for Van Camp's making a title to the plaintiff for a certain tract of land. The defendant pleaded two pleas. To the first plea the plaintiff replied, and obtained judgment on demurrer to his replication. Any further notice of that plea is therefore unnecessary. The second plea states that the intestate was only a surety in the bond; that the plaintiff had agreed with Van Camp, without the defendant's knowledge, to take a judgment by confession against Van Camp for 275 dollars, in a suit on the bond then pending against him, it being a less sum than he pretended he could recover; and to take a judgment against the defendant for the costs of an action then pending against him on the bond. The plea further states, that judgments were entered in accordance with that agreement. To this plea, the plaintiff demurred specially. The plea is alleged to be double. Its duplicity is said to consist in its showing, 1st, that the defendant's intestate was a surety, and that the plaintiff entered into an agreement with the principal which legally discharged him; 2dly, that there was a former recovery against the defendant by the plaintiff for the same cause of action. It is also

alleged, that the plea is defective because the
 [*386] *agreement to take the judgment against Van Camp, and the actual taking of it, is no defence.

The causes of demurrer must be considered together. The part of the plea to which the last objection applies is no bar of itself. If it were, the plea would be double. The objection for duplicity depends on the question, whether the plea contains more than one valid defence to the suit. Stevens on Pleading, 272. That is not the case

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here. The agreement of itself is no defence; nor is the agreement with the judgment against Van Camp, without a stay of execution, any bar—whatever it might have been, had execution been stayed. It is the agreement, the entry of the judgment against Van Camp, and the entry of the judgment against Brackenridge, taken together as one defence, that are relied on in order to make out a valid plea of former recovery against Brackenridge, for the same cause of action with the present one. No one of the facts is of itself a sufficient bar; but all of them united form one connected plea, which shows, *prima facie*, that there had previously been an adjudication on the merits of the cause, both against Van Camp and the defendant. If the merits of the cause of action, in this case, were really not adjudicated on and determined by the former suit, the plaintiff might have replied that fact. The plea is valid, and the judgment of the Circuit Court correct.

Per Curiam.—The judgment is affirmed with costs.

Smith and Rariden, for the plaintiff.

M'Kinney, for the defendant.

END OF NOVEMBER TERM, 1830.

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*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1831, IN THE FIFTEENTH YEAR OF
THE STATE.

MEMORANDA.

THE constitutional term for which the Judges of the Supreme Court were commissioned expired during the preceding vacation.

In the same vacation, Stephen C. Stevens and John T. M'Kinney, Esquires, were appointed Judges, in the place of James Scott and Jesse L. Holman, Esquires. And, at the same time, Isaac Blackford, Esquire, was reappointed one of the Judges of the Court.

The commissions of the present Judges bear date on the 28th day of January, 1831.

EVANS and Others v. THE STATE.

OFFICIAL BOND—BREACH OF—PLEADING.—Debt against A. on a penal bond payable to the state. The condition of the bond was, that A. should well and truly discharge the duties of collector of the state and county revenue of Owen county for the year 1829, and pay over the same as by

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law required. The declaration, after setting out the bond and condition, averred that A. had not paid over the taxes assessed on the county *388] of Owen to the county *treasurer, nor accounted for the same to the said treasurer, in the manner prescribed by law. *Held*, on special demurrer, that the declaration was insufficient (a).

ERROR to the Owen Circuit Court.

STEVENS, J.—This was an action of debt brought by the defendant in error, in the Owen Circuit Court, on the relation of Samuel Howe, the treasurer of said county of Owen, against the plaintiffs in error, on a bond for 20,000 dollars payable to the state of Indiana, bearing date the 19th day of June, 1829, conditioned that the said Andrew Evans, Jun., “should well and truly discharge the duties of collector of the state and county revenue of the county of Owen aforesaid for the year 1829, and pay over the same as by law required.” The declaration sets out the bond and condition, and then avers “that the said Andrew Evans, Jun., wholly failed and neglected to discharge his duty as such collector, and more especially in this, to wit, that the said Andrew Evans has wholly failed and neglected to pay over the taxes assessed on his county of Owen to the treasurer of said county, or to account therefor to said treasurer in the manner prescribed by law.” These are all the substantive breaches assigned. The defendants demurred to the declaration and set down as causes of demurrer, 1st, “that it does not appear by said declaration that the assessment roll for the year 1829 was delivered by the clerk to the said Andrew Evans, Jun.; 2d, the declaration does not show the amount of taxes collected by said Andrew Evans; and, 3d, there is no averment that any precept was ever delivered to the said Andrew Evans, commanding him to collect the taxes for the year 1829.” The demurrer was overruled and judgment rendered for the plaintiff; and the question now is, whether the Court erred in overruling the demurrer and

(a) 6 Blkf. 173; 8 *Id.* 527.

rendering judgment against the defendants in favor of the plaintiff.

The bond declared on is a penal bond, conditioned for the performance of the duties of a collector of state and county revenue. There is no original debt due from the obligors to the obligee, and the obligee could have no right of action, legally, until the collector failed to discharge his duties as such collector. Collectors of revenue have no duties to perform until there is an assessment of taxes made, and the assessment rolls corrected, approved, and filed in the office of the clerk of the [*389] *Circuit Court of the proper county, and a true transcript of such assessment roll delivered by the clerk to the collector, together with a precept in the name of the state of Indiana, under the seal of the Circuit Court, commanding the collector to collect the taxes set forth in the copy of the assessment rolls so delivered to him. R. C. 1824, p. 342, sec. 10, 11; Stat. 1825, p. 68, sec. 15, 16.

To entitle the plaintiff in this case to recover a final judgment and execution, it was necessary that he should spread upon the record, by legal averments, an assignment of breaches showing that the collector, Andrew Evans, had failed to perform his duties as such collector, and that thereby damages had been sustained. There are two modes by either of which this could have been done. The bond could have been declared on as a common bond, and the breaches assigned in the replication to the defendant's plea, if they had pleaded, setting out the condition; if they had not so pleaded, the breaches could have been assigned upon the record; or the bond and condition could have been set out, and the breaches assigned in the declaration. *Gainsford v. Griffith*, 1 Saund. 58, n. 1; *Ethersey v. Jackson*, 8 T. R. 255; *Homfray v. Rigby*, 5 M. & S. 60; *De La Rue v. Stewart*, 2 New Rep. 362; 1 Blackf. Rep. Appendix, 437. The plaintiff has elected the latter mode, and has assigned two breaches only. First, "that the said Andrew Evans, jun., has wholly failed and neg-

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lected to discharge his duty as such collector." This breach is insufficient, being vague and general without specifying how or in what manner he neglected and failed. *Shum v. Farrington*, 1 Bos. & Pul. 940; *Cornwallis v. Sarery*, 2 Burrow, 772; *Cheshire Bank v. Robinson*, 2 New Hamp. Rep. 126. The other breach is, "that the said Andrew Evans has wholly neglected and failed to pay over the taxes assessed on his said county." This breach is also insufficient, standing alone as it does, unsupported by other necessary averments. The averment may be true and yet the plaintiff not legally entitled to recover. It must appear by proper averments, that there was an assessment of taxes for county purposes on the county of Owen for the year 1829; and that there were assessment rolls of said taxes made, corrected, approved, and filed in the office of the clerk of the Circuit Court of the county; and that [*390] a true copy thereof had been delivered by *the clerk to the collector, together with a precept commanding him to collect the taxes according to law.

Per Curiam.—The judgment is reversed. Cause remanded to the Circuit Court, with directions to permit the plaintiff below to withdraw the joinder in demurrer, and amend the declaration.

Hester, for the plaintiffs.

Naylor, for the defendant.

END OF MAY TERM, 1831.

[*391]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1831, IN THE SIXTEENTH YEAR OF
THE STATE.

ARNOLD and Others, *v.* STYLES and Others.

REVIEW OF JUDGMENT—REALTY—VENUE.—A bill in chancery was filed in the Union Circuit Court, to revive a decree of the Franklin Circuit Court in favor of the complainant's ancestor, respecting land situate, at the time of the decree, in Franklin County. When the bill of revivor was filed, the land, in consequence of a change of county boundaries, lay in Union county. *Held*, that the bill of revivor should have been filed in the Franklin Circuit Court; the Union Circuit Court having no jurisdiction of the cause.

The merits of the decree can not be disputed by an answer to the bill of revivor.

PRACTICE—DEMURRER.—The mode of objecting to an answer as insufficient, is not by demurring, but by filing exceptions.

ERROR to the Union Circuit Court.

M'KINNEY, J.—The bill is filed in the Union Circuit Court by the heirs of Elizabeth Styles, to revive a decree which had been rendered in the Franklin Circuit Court, in favor of Elizabeth Styles against the heirs of Bird Styles.

The complainants show the proceedings had in the

Franklin Circuit Court, on a bill filed in 1818 by Elizabeth Styles against the heirs of Bird Styles; refer to and make the bill, exhibit, and decree in that cause, a part of their bill; and charge that the tract of land, the subject of litigation in that suit and then within the bounds of [*392] Franklin county, is at present within those *of

Union county; that the complainants are residents of the same county; that Elizabeth Styles died before the decree, or any part of it, was executed; that they are her legal heirs; and pray that the defendants may appear and show cause, if any they have, why the decree and other proceedings, abated as charged, should not be revived, and put in the same condition, &c. The defendants by their guardian answer as follows: that they are strangers to the proceedings had in the Franklin Circuit Court; that they are informed and believe that the proceedings are inoperative; that they then were and still are infants, and were without a guardian in that Court; that they believe that Elizabeth Styles had no other than a life estate in the premises; that the allegations in the bill, setting up a claim to the moiety of the land therein mentioned, were without foundation, and the proceedings a fraudulent attempt to take advantage of their youth and inexperience. They ask that the complainants be compelled to make strict proof of the allegations in the bill of Elizabeth Styles. To the answer the complainants demurred; the defendants joined in demurrer; and judgment was rendered in favor of the defendants, dismissing the bill with costs.

Bills of revivor are embraced in the class of "Bills not original," and are either an addition to or a continuance of an original bill, or both. Mitf. Pl. 31. The suit in the Franklin Circuit Court abated by the death of the complainant. If the decree was not executed before her death, as charged by the bill, her representatives, claiming an interest under it, are properly complainants to a bill of revivor. Formerly, when a suit abated after a

decree signed and enrolled, the decree was revived by scire facias. That practice has, however, yielded to the more ample relief afforded by the bill of revivor. By this bill, matter not litigated by the original parties can not be introduced after a decree. The bill merely continues the original suit and enables its prosecution by those whose interests have attached by the abatement. If the decree of the Franklin Circuit Court has not been executed, upon its revival, the representatives of the complainant, as regards the question of enforcement, or act to be done, occupy the same ground that the complainant herself would have done. It is well settled that when the jurisdiction of a Court of chancery attaches, [*393] it is *retained until it fully acts upon the subject before it. *Rathbone v. Warren*, 10 Johns. Rep. 587; 1 Madd. Ch. 23.

The complainants contend, that although in England a revival must have been in the Court in which the original proceedings were had, yet in this state it is different. We can not perceive a distinction. The necessity to revive in the same Court in England, it is believed, results not from the fact, as is supposed, that there is but one Court of Chancery, whose jurisdiction embraces the whole kingdom, but because the *records* remain in the Court in which they originate, and from the confusion that would arise if the same subject were litigated, by the same parties, at the same time and in different Courts. The principle equally applies to Courts of common law. A scire facias to revive a suit or a judgment can only issue from the Court in which the suit was brought, or the judgment rendered; because in such Court is the record. *Bingh.* on Judg. 127; 2 Arch. Prac. 98. If bills of revivor, thus brought, were sustained, bills of review, bills to impeach a decree for fraud, and the various modifications of bills not original, would rest on the same principle; and instead of that unity of proceeding, so favorable to the ends of justice, the greatest confusion would inevitably ensue.

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The complainants further contend, that as the land is now in the county of Union, and the parties reside in it, jurisdiction attaches to its Circuit Court. A Court of chancery acts *in personam* or *in rem*. It is immaterial by which it gains jurisdiction; once exercised, neither a change of county boundaries, nor a change of the residence of a party litigant, can arrest the prosecution of a suit. The Court has always jurisdiction to carry its own decrees into execution. It therefore follows, that if the decree of the Franklin Circuit Court be revived, it must be done in that Court.

The answer is clearly insufficient. The bill is to revive a decree. The decree, until reversed, is conclusive. It can not collaterally be questioned. If the decree was obtained by fraud, it may be impeached on that ground. This is done by a bill. The defendant by an answer to a bill of revivor can not question the justice of the decree. 2 Madd. Ch. 403. The answer then was not a response to the bill. When an insufficient answer is filed (exclu-

sive of its reference for impertinence or scandal), [*394] there is but one mode of objecting to it; *that is, by taking exceptions. Mitf. Pl. 250. The complainants, however, have demurred to the answer, and as causes of demurrer state, 1st, that the answer sets up no matter of defence that amounts to a bar to the relief sought by the bill; 2d, that there is no matter set up by the said answer that requires a replication thereto. These causes of demurrer may perhaps be regarded as exceptions taken to the answer. This would accord with the liberal practice of a Court of chancery. Exceptions are required to be specific. These causes of demurrer are general. Whether they are sufficient to require a better answer, it is thought unnecessary to decide. There is an obvious want of jurisdiction in the Union Circuit Court. For this reason, the judgment must be affirmed.

Per Curiam.—The decree is affirmed with costs. To be certified, &c.

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Perry, for the plaintiffs.

Rariden, for the defendants.

PUGH v. BUSSEL.

INSOLVENCY—DISCHARGE IN FOREIGN STATE.—A., having become indebted to B. in the state of Ohio where they both resided, gave his note to B. for the debt dated in 1821. In 1823, the parties being still residents in Ohio, A. took the benefit of the insolvent law of that state, and was discharged, so far as respected arrest and imprisonment, from all his debts, that of B. among the rest. Afterwards, A. removed to this state; and, to an action against him on the note, brought by C., the assignee of B., he pleaded—in discharge of his person from arrest or imprisonment for the debt—his above-mentioned discharge in Ohio. *Held*, on general demurrer, that the plea was good (a).

BANKRUPTCY—STATE RIGHTS.—Until congress exercise the right of passing uniform laws on the subject of bankruptcy, any state may enact a bankrupt law not impairing the obligation of contracts.

SAME—RETROACTIVE.—A state law merely discharging the person of the debtor from imprisonment, not his after-acquired property, for debts contracted in the state between its citizens, is constitutional, whether the debt was contracted before or after the passage of the law. But if the law discharge the debtor's after-acquired property as well as the person, a discharge under it is not valid, unless the creditor make himself a party to the proceedings which lead to the discharge.

SAME—STATE LAW—EFFECT IN FOREIGN STATE.—A discharge, by a state law, has no operation out of the state over contracts not made and to be carried into effect within the state; nor over the citizens of other states, who do not make themselves parties to the proceedings under the law.

SAME.—A discharge under an insolvent law, of the person and not of after-acquired property, may be pleaded in discharge of the person from [*395] imprisonment; and the judgment for the plaintiff, if the plea be supported, is, that he recover his debt, &c., to be levied not on the person of the defendant, but only on his property.

ERROR to the Rush Circuit Court.—This cause was submitted to the Court at the Nov. term, 1830, when the judgment of the Circuit Court was reversed. Vide the opinion, ante, p. 366. A re-hearing was afterwards

(a) *Infra* 366.

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granted; and, at the present term, the following opinion in the cause was delivered.

STEVENS, J.—This is an action of debt brought by Bussel against Pugh, in the Rush Circuit Court, on a note made by Pugh on the 11th day of August, 1821, to one John Jackson, and by Jackson transferred by assignment in writing, on the 16th day of December, 1829, to Bussel. Pugh pleads, in discharge of his body from imprisonment or arrest for said debt, a discharge obtained by him in the county of Hamilton and state of Ohio, by the Court of Common Pleas of that county under the insolvent laws of that state, on the 18th day of August, 1823. The plea avers the filing of his petition and schedule of debts; the appointment of trustees, and the surrender of his effects to the trustees according to law; and that the trustees gave bond and took upon themselves the office of trustees according to law; and that such proceedings were duly and legally had upon such petition and schedule, that the Court of Common Pleas on the 18th day of August, 1823, ordered and adjudged “that the person of the said petitioner be henceforth privileged from imprisonment, for any debt due and owing by him at the time of filing his petition.” The plea further avers that his discharge still remains of record in said Court of Common Pleas unreversed and in full force; and makes the proper reference to the record; and states that the said discharge took place after the note in question was made, and after it became due and payable, and long before Jackson had sold or transferred it to Bussel. The plea further avers that, at the time the debt was contracted and the note given, and at the time of the discharge, he and Jackson were both citizens of and resided in the county of Hamilton, and state of Ohio; and that the debt was contracted and the note made and delivered to Jackson there. The plea further avers that his body was discharged from imprisonment under or by virtue of the note or claim of Jackson; and that Jackson, as one of his creditors, be-

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came and was entitled to his distributive share of [*396] the estate so assigned to the trustees. *The plea is demurred to and the demurrer sustained by the Court; and thereby several questions are raised.

The first point is, are those insolvent state laws repugnant to that part of the federal constitution which vests exclusively in congress the power of establishing uniform laws on the subject of bankruptcy throughout the United States?

The provisions of the constitution which have a bearing on this point have been by a celebrated and learned jurist collated, and read thus: "Congress shall have power to coin money, regulate the value thereof and of foreign coin; but no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts, or pass any law impairing the obligation of contracts, but congress may establish uniform laws on the subject of bankruptcies." By this collation and transposition it is at once seen that the constitution has left nothing unfinished. It prohibits the states from impairing the obligation of contracts, and provides a uniform medium for the payment of debts, and expressly prohibits the states from interfering with that medium. It also provides a uniform manner of discharging debts without payment, when congress shall deem it expedient to legislate on the subject. The states are not excluded from any power antecedently possessed by them, except in three cases: 1, when a power is granted to congress in exclusive terms; 2, when the states are expressly prohibited from exercising it, in express terms and in a specific form; 3, where a power is granted to congress, the contemporaneous exercise of which by the states would be incompatible. The point now under consideration does not fall under either of those heads. The power of congress to establish "uniform laws on the subject of bankruptcy," as given by the constitution, is not exclusive of the states on the same subject, and until con-

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gress exercises that right, the states may constitutionally pass such laws, if they do not impair the obligation of contracts. And even if congress had exercised that right, the right of the states is not thereby extinguished, but only suspended so far as the two laws might conflict. It is said in the case of *Oyden v. Saunders*, 12 Wheaton, 369, that the fair exercise of that power by the states, does not necessarily involve a violation of the obligation of contracts, unless they pass beyond their own limits and the rights of their own citizens, and act upon [*397] *the rights of the citizens of other states, and come in collision with the judicial power granted to the United States, and thereby render their acts incompatible with the rights of the other states, and with the constitution of the United States. From this view of the case, it is clearly demonstrated that those laws are not necessarily repugnant to that part of the constitution, vesting in congress the exclusive power to establish uniform laws on the subject of bankruptcy.

The second point is, do those laws "impair the obligation of contracts," the power of passing which is expressly vested in congress?

The obligation of a contract is the law which binds the parties to perform their agreement. The Institutes and Pothier both call the obligation of a contract "the chain of the law." That law is the municipal law of the state where the contract is made, or where it is to be performed; and must govern it throughout whenever its performance is sought to be enforced. Lord MANSFIELD says, the general rule established by comity and the laws of nations, is, that the *lex loci* forms a part of the contract, and travels with it wherever the parties to it may be found, and is to be considered in expounding and enforcing it, unless the parties have otherwise agreed; as where it is to be executed in another state or country; in which case it is to be governed by the laws of the place where it is to be executed. 1 H. Black. 584; 2 Burr. 1078; Stra.

733; Black. Rep. 234, 258; Dallas, 360; 1 Gallison, 169. *Mather v. Bush*, 15 Johns. Rep. 233, 249. It is now a settled doctrine in all Courts, that the discharge of an insolvent from arrest and imprisonment only, is an infringement of the obligation of the contract. The imprisonment of the person of the debtor is no part of the law of the contract, but is simply a means of coercion: hence, those laws that only release the body of the insolvent from arrest and imprisonment are constitutional and valid. And it is also equally well settled, that a discharge of the insolvent's after-acquired property, is an infringement of the obligation of the contract, and those state laws which release not only the body of the insolvent, but also his after-acquired property, are laws impairing the obligation of contracts, and are unconstitutional and void.

In the case of *Baker v. Wheaton*, 5 Mass. Rep. [*398] 509; *Smith v. *Parsons*, 1 Ohio Rep. 236; *Smith v. Smith*, 2 Johns. Rep. 241; it is held that if the contract be made in the state where the discharge is had, between citizens of the state at the time of making the contract, it is good in all places against the citizens of that state and in all countries, because the laws of the state form a part of the contract, and the parties being citizens thereof, are bound by the laws, they having assented thereto as a part of the body politic. Again, in the cases of *Mather v. Bush*, 16 Johns. Rep. 233; *Blanchard v. Russell*, 13 Mass. Rep. 1; *Hicks v. Hotchkiss et al.* 7 Johns. Ch. Rep. 297; it seems to be considered that if the insolvent law, under which the debtor is discharged, is not made and in force at the time of making the contract, it forms no part of the contract. It is, however, now settled by the cases of *Sturges v. Crowninshield*, 4 Wheaton; *Ogden v. Saunders*, 12 Wheaton; *M'Millan v. M'Neill*, 4 Wheaton; *Mason v. Haile*, 12 Wheaton; that a state law that discharges only the person of the debtor from arrest and imprisonment, and not after-acquired property, for debts contracted in the state between its own citizens, to be paid

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or performed in the state, is constitutional and valid, whether the debt was contracted before or after the passage of the insolvent law. The circumstance of the act being passed before or after the contract is made, makes no difference. And in the case of *Clay v. Smith*, 3 Peters, 411, and *Sturges v. Crowninshield*, it appears to be considered that a state insolvent law, which discharges not only the person of the debtor from imprisonment, but also discharges after-acquired property, is valid, if the creditor makes himself a party to the proceedings which lead to the discharge in the state Court.

In surveying this doctrine in all its parts, and in endeavoring to arrive at a conclusion, warranted by the peculiar situation in which the several states stand in relation to the federal government, it is necessary to keep constantly in view that the federal constitution is the paramount law of each state, and forms a part of the *lex loci*, and therefore enters into and forms a paramount part of every contract, and is equally binding and valid in every state. In a case in 7 Johns. Ch. Rep. Chancellor KENT says, that the *lex loci* must be constitutional law, or it is no law and forms no part of the contract; that the constitution of the United States is the supreme law of the land of all the states, and forms a part of all contracts made in any part of the United States; and that any local law repugnant to the constitution can form no part of the same contract. And, again, in the case of the *Farmers' and Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheaton, 131, Judge MARSHALL says, that the circumstance of the parties being citizens of the same state, and the insolvent laws having been made and in existence prior to the making of the contract, and the discharge having taken place in the same state in the Courts thereof, makes no difference; that the constitution of the United States was made for the whole people of the Union, and is equally binding upon all the Courts and all the citizens.

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The result of all the foregoing cases is, that a state law discharging the person of the debtor from imprisonment only, and not his after-acquired effects, for debts contracted in the state between its citizens, is constitutional and valid, whether the debt was contracted before or after the passage of the law. And that a state law, discharging not only the person of the debtor from imprisonment, but also discharging his after-acquired property, is a law impairing the obligation of contracts, and a discharge under it is not valid, unless the creditor makes himself a party to the proceedings which lead to the discharge in the state Court.

The third point is, have those state laws any operation out of the state over contracts not made and to be carried into effect in the state between the citizens thereof; or have they any effect or operation on the citizens of other states?

The Courts in England maintain the doctrine that it is a rule of universal obligation that the assignment of the bankrupt's effects, under a law of the country of the contract, is binding everywhere. It is perhaps settled in that country that the discharge of a bankrupt shall be effectual against contracts of the state that gave the discharge, no matter what be the allegiance or country of the creditor. Their doctrine is, that the bankrupt law of the country is paramount in disposing of the rights of the bankrupt. The United States appear to have established a different doctrine. In the federal as well as the state Courts, where such cases have been adjudicated, it has been decided that notwithstanding the bankruptcy of the debtor in England, or other foreign country, by their laws, his creditor here may levy an attachment on a debt due to the [*400] bankrupt in this *country and appropriate it to his own use. And further, our Courts give the debts due to the bankrupt here, to satisfy a debt contracted in England, to the prejudice of the English law, which gives the same debt to the assignees of the bank-

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rupt. *Ogden v. Saunders*, 12 Wheaton, 360; *Harrison v. Sterry*, 5 Cranch, 298, 302.

In the case of *M'Millan v. M'Neill*, 4 Wheaton, 209, Judge MARSHALL says, that it is well settled that a discharge under a foreign law is no bar to an action on a contract made in this country. And in the case of *Buckner v. Finley and Van Lear*, 2 Peters. 590, the Court says that "for all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws; but that in all other respects, the states are necessarily foreign to, and independent of, each other." The same is said by the Court of Appeals in Virginia in the case of *Warder v. Arell*, 2 Wash. 298, where the Court states the law as it respects a foreign country, and then adds, "the same principle applies to the different states of America." This principle, says Judge Baldwin, in the case of *Woodhull and Davis v. Wagner*, seems directly applicable to the insolvent laws of the states. Such laws are wholly unconnected with the federal relations of the states to the general government, where they do not impair the obligation of contracts; and discharges under them are, in other states, to be considered as made under foreign laws and subject to the same rules of decision. In the cases of *Watson v. Bourne*, 10 Mass. Rep. 337; *Baker v. Wheaton*, 5 Mass. 509; *Van Raugh v. Van Arsdaln*, 3 New York, T. R. 154; *Smith v. Smith*, 2 Johns. Rep. 241; *Ogden v. Saunders*, 12 Wheaton, 213, it is settled that a discharge of a debtor under a state insolvent law is not valid against a citizen or creditor of another state, they not being parties or assenting to the laws. And, in the cases of *Emory v. Grenough*, 3 Dallas, 369, and *Proctor v. Moore*, Williams' Rep. 198, it is decided that if two citizens of the same state contract under the insolvent laws of the state, and, after the contract is made, one of them remove to another state, the one remaining in the state where the contract is made can not be discharged there-

from by the insolvent laws of the state, the other being a citizen of another state.

[*401] *These cases, together with the cases of *Shaw v. Robbins*, note to 12 Wheaton, 369; *M'Millan v. M'Neill*; *Ogden v. Saunders*; *Harrison v. Sterry*, and *Robinson's Admr. v. Bank of Georgetown*, established the doctrine beyond a controversy, that a discharge by a state law operates only on contracts made in the state between its own citizens, which are to be executed there; and that such laws have no operation out of the state, over contracts not made and to be carried into effect within the state, nor over the citizens of other states, unless they voluntarily make themselves parties to the proceedings which lead to a discharge in the state Courts.

The fourth and last point made in the case is, can the debtor when he has been constitutionally discharged in his own state under the laws thereof, plead that discharge in another state as a defence in bar against the imprisonment of his body, to an action brought on a debt from which he has been so discharged; and if he can so plead it, what is the form of the judgment to be rendered thereon?

In the cases of *Baker v. Wheaton*, *Smith v. Parsons*, and *Watson v. Bourne*, and the case of *Babcock v. Weston*, 1 Gall. Rep. 168, it is held to be a settled principle, that a legal discharge once obtained between citizens of the same state, is valid and binding in every state in the Union, on general principles; and much more so under the federal compact. These decisions on this point have, we believe, never been called in question. The Court is of opinion that the discharge now in question, of the debtor in the state of Ohio, is valid between the defendant and Jackson, and that the assignment of the note to Bussel does not altar or affect the case; and that therefore the plea of the defendant is well pleaded. In England, they have an insolvent law called the Lord's act, which discharges the person of the debtor from imprisonment, but does not dis-

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charge his after-acquired property. Under that act such pleas are common, and the form thereof well settled. See 2 Chitty's Pleading, 356,357. The judgment in such cases is, that the plaintiff recover of the defendant his debt, damages, and costs, to be levied, not on the person of the defendant, but on his goods and chattels, lands and tenements. Bingham on Judgments and Executions, 328,329.

Per Curiam.—The judgment is reversed with costs.

Cause remanded, &c. (1).

[*402] **Smith*, for the plaintiff.

Rariden, for the defendant.

(1) The subjects, to which the opinion in the text relates, and the authorities connected with them, are very fully examined in Kent's Commentaries, 2d ed. 1 vol. pp. 419 to 423; 2 vol. pp. 389 to 408.

The language of Judge Story, as to the authority of the states to pass insolvent laws discharging the obligation of contracts, is as follows: "It is not doubted, that the states may pass insolvent laws, which shall discharge the person, or operate in the nature of a *cessio bonorum*, provided such laws do not discharge, or intermeddle with the obligation of contracts. Nor is it denied, that insolvent laws, which discharge the obligation of contracts, made antecedently to their passage, are unconstitutional. *Sturges v. Crowninshield*, 4 Wheat. R. 122; *Farmers and Mechanics' Bank v. Smith*, 6 Wheat. R. 131; *Ogden v. Saunders*, 12 Wheat. R. 213. But the question is, how far the states may constitutionally pass insolvent laws, which shall operate upon and discharge contracts, which are made subsequently to their passage. After the most ample argument it has at length been settled by a majority of the Supreme Court, that the states may constitutionally pass such laws operating upon future contracts. *Ogden v. Saunders*, 12 Wheat. R. P. 254 to 357." 3 Story's Comm. 252.

Respecting the contracts to which such state insolvent laws can rightfully apply, the same distinguished writer says: "The result of the various decisions on this subject is, 1. That they apply to all contracts made within the state between citizens of the state. 2. That they do not apply to contracts made within the state between a citizen of a state and a citizen of another state. 3. That they do not apply to contracts not made within the state. In all these cases it is considered that the state does not possess a jurisdiction, co-extensive with the contract, over the parties; and therefore, that the constitution of the United States protects them from prospective, as well as retrospective legislation. *Ogden v. Saunders*, 12 Wheat. R. 358; *M'Millan v. M'Neill*, 4 Wheat. R. 209. Still, however, if a creditor voluntarily makes himself a party to the proceedings under an insolvent law of a state, which discharges the contract, and accepts a dividend declared under such law, he will be bound by his own act, and be deemed to have abandoned his extra-territorial immunity. *Clay v. Smith*, 3 Peters' Rep. 411." 3 Story's Comm. 256.

Wilson v. Coles.

WILSON v. COLES.

PRACTICE—APPEARANCE—WAIVER.—After a cause had been continued, the parties appeared during the same term and proceeded to trial. This was held not to be erroneous. The proceeding to trial, which must be presumed to have been by consent, cancelled the previous order of continuance (a).

RECORD—AFFIDAVIT.—Neither an affidavit for a continuance, nor any objection of a party to the ordering on a cause for trial, is any part of the record unless made so by a bill of exceptions (b).

ERROR to the Allen Circuit Court.

BLACKFORD, J.—Trespass by Wilson against Coles. Plea, the general issue. Verdict and judgment for the [403] defendant. *The record states that this cause was continued on the 10th of November, 1828; and that, on the next day, the parties appeared by their attorneys, and for trial put themselves upon the country. It further appears that a jury was impaneled, and that a verdict and judgment were rendered for the defendant.

There is no error in these proceedings. Although the cause had been continued, the parties might afterwards, if they chose, proceed to trial. Their proceeding to trial cancelled the previous order of continuance. The plaintiff relies for a reversal of the judgment on his having been entitled to the continuance, in consequence of an affidavit alleged to have been made on his behalf, and on his having objected to the cancelling of the order of continuance. These grounds of error, however, do not appear of record. The affidavit and the objection to the proceeding to trial, alleged to have been made for the plaintiff, could only be shown by a bill of exceptions. The transcript of the record, to be sure, contains the copy of an affidavit for a continuance made on the part of the plaintiff, together with a statement that he objected to proceeding to trial after the order of continuance, and

(a) 60 Ind. 158; 57 *Id.* 559; 43 *Id.* 357.(b) 16 Ind. 476; 50 *Id.* 270; 19 *Id.* 130.

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that he tendered a bill of exceptions to the opinion of the Court ordering on the trial, which the Court refused to seal. These circumstances, however, are only the statements of the clerk, and constitute no part of the record. As the case is presented to us, we must consider that the Court correctly permitted the cause to proceed after the order of continuance; and that the trial took place by consent of the parties. The judgment must, therefore, be affirmed.

Per Curiam.—The judgment is affirmed with costs.

Cooper, for the plaintiff.

Rariden, for the defendant.

JAQUES v. The BOARD OF COMMISSIONERS OF VIGO COUNTY.

WAIVER OF WRITTEN AGREEMENT BY PAROL.—A. having obtained a judgment against a county, purchased, under an execution on the judgment, a number of town lots belonging to the county. Afterwards, at a public sale of these lots by the county, B. bought one of them for a small sum with notice of the previous sale, paid the purchase-money, took a receipt for the same, and entered into possession. A. died, and the county [*404] made a compromise *with his heirs, who released their interest in the said lots to the county, on receiving back the purchase-money paid by A.; the purchasers at the said public sale, B. among the rest, agreeing by parol to release their interest in the lots to the county on being re-paid their purchase-money. The county tendered to B. his purchase-money for the lot he had bought, which he refused to accept; and he refused also to execute the release. C. afterwards, with B.'s knowledge and without any objection by B., purchased the last-named lot of the county, and received a deed from the county for the same. A bill in chancery, filed by B. against the county to obtain a title for the lot thus bought by C., was dismissed for want of equity.

M'KINNEY, J.—This is a suit in equity for the specific performance of a contract to convey land. It has been transferred from the Vigo Circuit Court previous to a decree, the President Judge having been engaged as counsel in the cause.

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The complainant alleges that he purchased of the defendants lot 132 in the town of Terre Haute, the payment of the purchase-money, and the refusal of the defendants to execute a quit-claim deed, agreeably to the terms of the sale; that, by consent of the defendants, he took possession of the lot and made improvements thereon; and prays specific performance. The defendants, in their answer, admit the sale and payment of the purchase-money. They, however, introduce new matter which the complainant is called upon to answer. They charge that complainant, prior to his purchase of the lot, knew that it and others belonging to the county of Vigo, had been sold under an execution, issued on a judgment against the county in favor of John Brocklebank; that they were purchased by him, and that deeds were executed; that after the sale to complainant, by an agreement between the defendants and the executor and heirs of Brocklebank, the latter released to the county their interest in said lot and others purchased under the said judgment, on receiving from the county the purchase-money which had been paid for the same. They further charge that they would not have entered into the agreement with the heirs of Brocklebank had not the complainant and others who had purchased lots at the time complainant did, agreed that if the defendants entered into that agreement, an assignment of their interests in the lots should be made, on receiving back the purchase-money which had been paid; that this was done to enable the county to secure a good title to the lots; that the agreement has been complied with by all the parties except the complainant, by releases executed and [*405] *payment of the purchase-money; that the complainant has refused to receive the purchase-money, it having been tendered, or to release his interest to the lot; that he did not refuse to release his interest until after the heirs of Brocklebank had released to the county; that since the release by the said heirs, the de-

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defendants have sold the lot to one Ross, and executed a warranty deed for the same; that the sale was made to Ross, with the knowledge of the complainant and without any objection being made by him. The complainant, in his answer to the new matter, admits his knowledge of the purchase of the lot by Brocklebank, but says he did not believe it valid; denies that he agreed to assign his interest to the county, on condition that the heirs of Brocklebank released their interest; denies knowledge of such release being made except from hearsay; denies the tender of the purchase-money. The depositions fully support the defensive matter charged in the defendant's answer.

The case presents a single question: Is the agreement by the complainant, to assign his interest in the lot in controversy, obligatory upon him? It is contended that it is by parol, without consideration, and consequently void. If this were so, it is clear that it would be inoperative. A view of the case, it is thought, will warrant a different conclusion. The lot was owned by the county of Vigo. It had been sold on an execution against the county. The complainant afterwards purchased it on a sale for taxes. He held a tax-title. The validity of his title had not been established. He had purchased with a knowledge of the prior sale. The defendants and the representatives of the purchaser under the execution entered into an agreement, by which the latter released to the county their interest in that and other lots purchased under the execution, upon having refunded by the county the money paid for them. This agreement was entered into by the defendants on condition that the complainant, and others who had purchased lots at the time of complainant's purchase, should also release their interests in the lots to the county, upon re-payment of the purchase-money. To this agreement the complainant was a party. The defendants were unwilling to refund to the heirs of Brocklebank the purchase-money of the lots, unless the

subsequent purchasers would release their interest. They agreed to do so, upon receiving the money they [*406] had paid. The title of the *county would thus become perfect. The agreement appears to have been executed by all except the complainant. Having induced the defendants by his agreement to release, to repay to the heirs of Brocklebank the purchase-money of the lots, and having acquiesced in a sale since made by the defendants of the lot, it would surely be contrary to every principle of justice that he should now be permitted to enforce a title. The defendants have complied with their agreement. They tendered the purchase-money, and it was refused. A conveyance now decreed to the complainant relieves him from a struggle with a prior title. It enables him to take advantage of his own wrong. This the law does not permit, nor does it regard fraud as the subject of its favor.

We have not had before us the written agreement, which it is said can not be waived. It appears that a receipt was given to the complainant. Its terms, however, do not appear. A mere receipt for money will not, of itself, constitute a right to the specific performance of a contract for the conveyance of land. *Ellis v. Deadman's heirs*, 4 Bibb, 467; Sugd. on Ven. 46. If the receipt contained the terms of the agreement, it is clear its performance has been waived by the complainant. That an agreement in writing may be waived by parol is well established. *Botsford v. Burr*, 2 Johns. Ch. Rep. 405; Sugd. on Ven. 97; Rob. on Frauds, 89; *Price v. Dyer*, 17 Ves. 356; *Lucas v. Mitchell*, 3 Marsh. 245 (1). The sale of the lot to Ross by the defendants, without objection on the part of the complainant, shows the light in which he viewed the agreement he had entered into. Had he deemed his title subsisting, it may well be supposed he would have made it known and resisted the sale. He, however, remains silent. If such conduct, a fraud upon Ross, would have enabled him to enforce a conveyance,

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the defendants in resisting the present claim should succeed. That Ross could have enforced a title, it is thought, is clear. *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 344; *Dann v. Spurrier*, 7 Ves. 231.

If this bill were sustained, and a decree granted agreeably to its prayer, the principle of equity would be reversed, which requires a party who invokes its aid to appear with clean hands, and a triumph afforded to fraud.

The bill must be dismissed with costs.

[*407] **Per Curiam*.—The bill is dismissed with costs.

Cone, for the complainant.

Farrington, for the defendants.

(1) A parol waiver and abandonment of an agreement duly signed, may be set up as a defence to a bill for specific performance; but the circumstances must be such as to evince an intention in the parties that there should be a total dissolution of the contract, placing them in the same situation in which they stood before the agreement was entered into. *Robinson v. Page*, 3 Russ. 114; 2 L. L. M. 698.

TOLEN v. TOLEN.

DIVORCE—JURISDICTION OF FOREIGN PARTY.—Petition by a wife for a divorce. The marriage was solemnized in Kentucky, where the parties then resided. The husband there, in 1822 or 1823, deserted his wife, and has ever since lived in adultery with another woman. Two or three years after the desertion, the wife removed to this state, where she has since that time resided. The husband was never resident here; and the notice to him of the pendency of this suit was by publication. *Held*, that the Circuit Court, under the statute, has jurisdiction of the cause (a).

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.—The constitutional provision, prohibiting laws impairing the obligation of contracts, does not extend to general laws authorizing divorces; provided the legislature, in the exercise of its power, does not pass beyond the rights of its own citizens, and act upon the rights of the citizens of other states.

DIVORCE—LEX DOMICILII.—In a suit for a divorce, the *lex domicilii* is the rule of decision.

ERROR to the Decatur Circuit Court.

STEVENS, J.—The plaintiff filed her petition in the De-

(a) 10 Ind. 436; 24 *Id.* 355.

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catur Circuit Court praying a divorce from her husband, the defendant; by which it appears they were married in the state of Kentucky, where they both resided, and that they continued to reside there as man and wife, after their marriage, until in the year 1822 or 1823, when the defendant eloped with an adulteress, with whom he has ever since lived, and by whom he has had five or six children; that two or three years after the elopement, the plaintiff removed to the state of Indiana and permanently settled in the county of Decatur, where she has resided for the last five years. The Circuit Court decided that they had no jurisdiction of the case, because the marriage and causes of divorce both took place in the state of Kentucky, and the defendant has never resided in this state.

A more unsettled question could not perhaps be presented to the Court. It has been more or less [*408] discussed in the Courts of *Europe and America for many years, and many of the decisions are apparently conflicting. Divorces are of two kinds, *a mensa et thoro* and *a vinculo*; and the causes of divorce are as different and various as there are different states and governments. By the civil law, either party might renounce the marriage union at pleasure. Justinian for a short time abolished divorces, but was compelled to revive them again. He restored the unlimited freedom of divorce, and gave as a reason that the hatred, misery, and crimes, which often flowed from indissoluble connections, required that marriages should be subject to dissolution by mutual will and consent. By the ecclesiastical law, a marriage may be dissolved and declared void *ab initio*, for canonical impediments existing previous to marriage. In the Roman Catholic states, heretofore, divorces were not allowed, because marriage was considered by them a sacrament and indissoluble. The Napoleon Code admits of divorces for several named causes to be pronounced by the tribunals, where the parties can not agree on a dissolution, and in all cases where the parties agree thereto.

In England, a divorce *a vinculo* is seldom granted except for adultery, but divorces *a mensa et thoro* are very common and often for very trifling causes. In some of our states, divorces *a vinculo* are restrained by constitutional provisions, which require the assent of two-thirds of the legislature founded on previous judicial investigation. In some, divorces are granted solely by special acts of the legislature; in others, divorces *a vinculo* are judicially granted for adultery only; and in others, not only for adultery but also for ill treatment, abuse, abandonment, and many other causes. In our state, divorces *a vinculo* only are granted; a divorce *a mensa et thoro* is not authorized. The causes of divorce are, 1st, a former subsisting marriage; 2d, impotency; 3d, adultery; 4th, abandonment; 5th, condemnation for a felony; 6th, barbarous and inhuman treatment; and 7th and lastly, "in any other case where the Court in their discretion shall consider it reasonable and proper that a divorce should be granted."

The first point is, how far the legislature of a state can interfere with a marriage contract under the constitution of the United States, which prohibits the states from passing laws impairing the obligation of contracts.

In the case of *Dartmouth College v. Woodward*, 4 [*409] Wheaton, *529, Judge MARSHALL says, "This provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a Court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other." And in the same case Judge STORY says, "A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only

effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract." The Court is of opinion that the states, in the fair exercise of their legislative powers, do not necessarily involve a violation of the obligation of contracts in passing general laws authorizing divorces, if they do not, in the exercise of those powers, pass beyond the rights of their own citizens and act upon the rights of the citizens of other states, and thereby produce such a conflict of the sovereign powers and collision of the judicial powers of the other states, as to render the exercise of such powers incompatible with the rights of other states, and with the constitution of the United States. We believe that all Courts and jurists agree, that a divorce granted under the laws, and by the constituted authorities, of the government or the state where the parties are domiciled, and where the marriage contract was entered into, is valid and binding every where. The great difficulty is, where the divorce is granted out of the state where the marriage contract was entered into, and afterwards the parties return to their native state. How are the Courts of the native state to treat the foreign divorce? This brings us to the second point in this case, which is—

Does the *lex loci* form a part of the marriage contract, or is it governed by the *lex domicilii*?

In England, it is settled that no foreign Court is competent to pronounce a divorce *a vinculo* of English [*410] marriages, for any *cause other than such as would be warranted by the *lex loci contractus*. In the state of New York the English doctrine is adopted, and no divorce of New York marriages, pronounced by any foreign tribunal out of the United States, is valid, unless it be for adultery; that being the only cause of divorce

in that state. But whether a divorce, judicially granted in one of these United States of a New York marriage, would be entitled to a different consideration in that state, has not as yet been decided. If it would, it is owing to the force which the national compact, and the laws made in pursuance of it, give to the records and judicial proceedings of other states. Lord MEADOWBANK, in the High Court of Sessions in Scotland, in reviewing the English doctrine on the subject of divorce, says that the relation of husband and wife, wherever originally constituted, is entitled to protection and redress by the laws of the country where the parties may reside. That by marrying in England, the parties do not become bound to reside there forever, nor are they bound to treat each other in every country according to the laws of England. That a redress of a violation of the duties of the marriage state, belongs to the laws of the country where the parties reside. There is nothing in the will of the parties that gives the *lex loci* any particular force over the marriage contract, or that impedes the course of the *jus publicam* in relation to it. That the relation of husband and wife is acknowledged *jure gentium*; and the right to redress wrongs incident to that relation, exists in the laws of the country wherever the parties may be, though the marriage may have been celebrated elsewhere. Other contracts are modified by the will of the parties, and the *lex loci* becomes essential; but not so with matrimonial rights and duties. Unlike other contracts, they can not be dissolved by the will and consent of those who made them. Matrimonial contracts are *juris gentium*, and admit of no modification by the will of the parties. Hence, it is not necessary that a foreigner should have acquired a domicile *animo remanendi*: the law of the country at once applies its own rules to all domestic relations, otherwise a numerous description of persons would be permitted to violate with impunity the obligations of domestic life. That each country is bound to look to its own laws in the adminis-

tration of that department, otherwise the whole [*411] order of society would be disjointed. If the *lex *loci* followed and governed the parties wherever they went, it would lead to inextricable difficulties, and the country would be filled with privileged castes, each living under separate laws. It is immaterial where the marriage was entered into, it is binding in all countries, not by virtue of the *lex loci*, but by the law of nations. If the *lex loci* were the ligament that continued to bind it, the same law of course would have to be applied to when a dissolution of it was called for; and the parties under a Prussian marriage would be entitled to a divorce *a vinculo* for any of the great variety of whimsical cases for which a divorce is allowed by the Prussian code. This much has been said for the purpose of throwing some light on the subject, and from the best view which we can take of the whole ground, we are of opinion that the *lex domicilii* must govern the marriage contract, and the laws of the country wherever the parties may be domiciled must be applied to their domestic relations.

The third and last point in the case is, had the Circuit Court jurisdiction?

It appears from the plaintiff's own showing that the marriage contract was made and entered into in the state of Kentucky, where both parties resided; that the causes of divorce arose there; and that the defendant does not now reside, nor has he ever resided, in this state. In the states of New York and Massachusetts it has been decided that where one or both of the parties remove into another state for the purpose of procuring a divorce contrary to the laws of their own state, without an absolute change of domicile, such divorce is null and void, it being obtained by fraud; and that the Court pronouncing such decree has no jurisdiction, having been imposed upon by fraud and collusion. These decisions we think are good law, but can not apply to the case under consideration. There is neither fraud nor collusion in this case; the

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plaintiff is now and has been for several years, a *bona fide* citizen of this state, and has acquired a domicile *animo remanendi*, and is entitled to the benefit of the laws. The statute of the state of New York only authorizes divorces *a vinculo* in the single instance of adultery; and a bill for a divorce can only be sustained for that cause in two cases: one, where the married parties are inhabitants of the state at the time of the commission of the adultery; the other, where the marriage is entered into in [*412] the state, and the *party injured is an actual resident at the time the adultery is committed, and at the time of filing the bill. We have no such statutory provisions as these, and therefore the judicial decisions of that state, founded as they are on these statutes, can shed but little light on the point now under consideration. The statute of this state provides that absolute divorces shall be granted on the petition of the party aggrieved, and that all persons who shall have resided in the state one year shall be entitled to the benefit of the act. It also provides that proceedings may be had against non-residents as well as residents, and points out the mode of giving actual notice to residents, and constructive notice to non-residents. It does not require that the defendant shall be a resident of, or that the marriage contract should be entered into in, or that the causes of divorce should arise in, the state. The Court is of opinion that if the statute is constitutional, it gives the Circuit Court jurisdiction of the case; and that the statute is constitutional it has no doubt.

The questions whether divorces granted in one state will be valid in another under all circumstances, and if valid, to what extent, are not now before the Court. These questions are grave questions under our federal constitution, and if they should ever be presented, they will be entitled to the most cautious and mature consideration.

The State, on the complaint of Hagaman v. Stafford.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c., (1).

Smith, for the plaintiff.

Brown, for the defendant.

(1) The reader will find the law concerning divorces examined at large in Kent's Commentaries, 2d ed. vol. 2, pp. 95 to 128. Vide, also, Indiana R. C. 1831, p. 213.

THE STATE, on the complaint of HAGAMAN v. STAFFORD.

BASTARDY—CRIMINAL PROCEEDING.—The provisions of the 77th section of the act of 1824, relative to crimes and punishments, requiring certain actions to be brought within one year next after the offence committed, do not apply to prosecutions under the act for the support of illegitimate children.

ERROR to the Greene Circuit Court.

BLACKFORD, J.—This was a prosecution under [*413] the statute for *the support of illegitimate children.

The accusation was made by the mother before a justice of the peace on the 19th of September, 1829; and the child is alleged to have been born on the 11th of January, 1826. The Circuit Court set aside the proceedings and discharged the defendant.

It is contended, that this suit could not be brought after the expiration of a year from the birth of the child, according to the 77th section of the act relative to crimes and punishments. Stat. 1824, p. 150. That provision, however, is confined to actions for forfeitures on penal statute and has no application to a case like the present for the support of an illegitimate child.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Merrill, for the plaintiff.

Kinney, for the defendant.

Simonds v. Colvert and Others, Executors.

SIMONDS v. COLVERT and Others, Executors.

JUSTICE OF PEACE—JURISDICTION—ADMINISTRATORS.—The jurisdiction of justices of the peace does not extend to cases in which an executor or administrator is either plaintiff or defendant (a).

ERROR to the Sullivan Circuit Court.

M'KINNEY, J.—An action of debt was brought against the defendants as executors of Robert Colvert, deceased, before a justice of the peace. The case was submitted to a jury, and they found for the defendants. The plaintiff appealed to the Circuit Court, and on motion of the defendant, the case was dismissed on the ground of want of jurisdiction.

The question before us is, has a justice of the peace jurisdiction in a case in which an executor is defendant? This is an important question. We approach it with a consciousness that its settlement will be sensibly felt, in the adjustment of claims within the jurisdiction of a justice of the peace, growing out of contracts in the representative character. We have given the subject every attention, anxiously seeking, by analogy and precedent, a means of arriving at a proper conclusion. The jurisdiction

of a justice of the peace, in civil actions, is [*414] *unknown to the common law. Such jurisdiction is given alone by statute. When a statute creates a new jurisdiction, the fixed rules of construction denies to such jurisdiction the exercise of a power not directly given. It can not overstep the provisions of the statute by which it is created, and enlarge itself by inference or implication.

We have examined the acts regulating the jurisdiction of justices of the peace, and find no provision which gives a justice of the peace jurisdiction, in a case in which an executor or administrator is either plaintiff or defendant. The provisions of the statute, in authorizing process to

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issue, in directing the manner of rendering judgments, regard the parties litigant as acting in their own rights and not *in auter droit*. The case of *Wells v. Newkirk, Executor of Pierson*, 1 Johns. Cases, 228, is in point. The Supreme Court of New York, in that case, in deciding against the jurisdiction of justices of the peace, by inference or implication, where an executor was either plaintiff or defendant, present reasons which irresistibly apply to such jurisdiction in this state. Our statute applies to cases in which a suit is prosecuted or defended in a party's own right, and not *in auter droit*. Process and judgment are predicated upon individual responsibility: no exception as to arrest on warrant, or limitation of the operation of a judgment. Execution issues against a defendant personally, or against his individual property. Defences which are incident to the representative character, are precluded before a justice of the peace without legislative enactment. The plea of *plene administravit*, or of outstanding debts, may put in issue in amount greatly exceeding the jurisdiction of justices of the peace, and, if acted upon, require an examination of the whole administration. No judgment can be rendered for assets *in futuro*, nor against the property of the testator. Such are some of the grounds upon which the decision in New York is founded. They apply to the case before us. The judgment of the Circuit Court must be affirmed (1).

Per Curiam.—The judgment is affirmed with costs.

Judah, for the plaintiff.

Kinney, for the defendants.

(1) Justices of the peace have now, by statute, the same jurisdiction in all cases *where executors, administrators, or guardians, are plaintiffs, that they would have, were those persons suing in their own right. But if the defendant, in such a case, plead any matter of payment, &c., the plaintiff may have the cause removed to the Probate Court. Vide Stat. 1832, p. 251; 1833, p. 109; 1834, p. 157.

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DAGGETT v. ROBINS.

RES ADJUDICATA—NONSUIT.—If the plaintiff, in an action of replevin, be nonsuited, he is not thereby barred from bringing another action of replevin; the merits of the cause not having been tried. This is the common law; and the statute in England of Ed. 1, prohibiting a second replevin after a nonsuit, is local to that kingdom and not in force here.

REPLEVIN—PRACTICE.—The action of replevin is not limited to cases of distress; but lies in all cases of tortious and unlawful taking and detention of goods and chattels (*a*).

SAME.—Writs of replevin, in this state, are issued out of the Circuit Court and returned thither as writs in other cases; and the action of replevin is proceeded in and tried as other actions are.

APPEAL from the Vigo Circuit Court.

STEVENS, J.—This was an action of replevin, commenced by the appellant against the defendant for certain goods and chattels, which he alleged the defendant unjustly and unlawfully took and detained from him. The defendant pleaded in bar that the plaintiff in the year 1829, in the Vigo Circuit Court, by an action of replevin against the defendant, replevied the same goods and chattels out of the defendant's possession; and that at the May term, A. D. 1830, of said Circuit Court, the said plaintiff was nonsuit, and the defendant had judgment for a return of the goods and chattels; and that they were returned by the sheriff of the county. To this plea the plaintiff demurred, and the demurrer was overruled by the Court and judgment rendered for the defendant.

The principal question is, whether a nonsuit in replevin is a bar to a second replevin. By the common law it would be no bar, but the statute of Westminster 2 (13 Ed. 1, st. 1), chap. 2, restrains the plaintiff in replevin from a second replevin after nonsuit, but permits him to proceed with his first action by a writ of second delivery, and if he should become nonsuit after the writ of second delivery, no further proceedings can be had. The counsel

(a) 6 Blkf. 136; 4 *Id.* 304.

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for the appellant insists that the record in this case shows it to be an action founded on a statute of [*416] the *state authorizing the action of replevin in all cases where goods and chattels are unlawfully taken or detained, and not governed by the statute of Westminster, which relates only to replevins founded on a distress for rent. The record does not show whether the action is founded on a distress for rent or not, nor is it material that it should; the action in either case, when once in Court, is governed by the same principles and rules of practice. The record in an action of replevin never shows whether it is bottomed on a distress for rent or not, unless the defendant in replevin spreads that fact upon the record by his avowry, cognizance, or other defence which he may make to the action. It is true, that at the time those proceedings were had in the Vigo Circuit Court, there were two statutes authorizing the action of replevin, the one founded on a distress for rent, and the other regulating the proceedings, when the action is founded on any other unlawful and unjust taking or detaining of goods and chattels. But these acts only provide for the issue and service of the writ, the disposition to be made of the goods and chattels replevied, and the condition and effect of the replevin-bond, &c. The pleadings, prosecution and proceedings in each action, and the judgment rendered, and the execution awarded, are the same, except as to costs.

The only action now in use is in the *detinuit*, and is an action that lies not only in the case of a wrongful distress for rent, but in all cases where goods and chattels are tortiously and unjustly taken and detained; and our statutes above noticed do not materially change the general doctrine on the subject. The passage in Blackstone's Commentaries, which says that replevin only lies in case of an unlawful distress, is unwarranted, and is contradicted by the best authorities in England and America. Vide 2 Saund. Plead. and Evidence, 760; 1 Chitt. Plead. 119;

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Bishop v. Montague, Cro. Eliz. 824; *Pangburn v. Partridge*, 7 Johns. Rep. 140; *Shannon v. Shannon*, 1 Schoales & Lef. 327; *Ilseley et al. v. Stubbs*, 5 Mass. 283. The action of replevin is founded on a tortious taking and detaining, and is analogous to an action of trespass, but is in part a proceeding *in rem*, to regain possession of the goods and chattels; and in part a proceeding *in personam*, to recover damages for the caption and detention, but not for the value thereof. Vide *Hopkins v. Hopkins*, 10 Johns. Rep. 373; 1 Chitt. Plead. *119; 1 Saund. Rep. 347, b, note 2; *Fletcher v. Wilkins et al.*, 6 East, 283 (1).

In England there are two kinds of replevin; first, by common law, when the writ issues out of the Court of chancery; second, by the statute of Marlbridge, 52 Hen. 3, which enables the sheriff to make replevins without any writ, and then, having taken security, proceed on the complaint of the plaintiff, either by parol or precept to his bailiff, and if a claim of property is put in, the writ of *de proprietate probanda* at once issues, and is tried by an inquest, and if found for the plaintiff, the sheriff goes on to make the replevin, but if for the defendant, he forbears. If the writ issues out of chancery at common law, it is only directory to the sheriff to make replevin and proceed in the county Court, and is not a returnable process. In that case, the writ *de proprietate probanda* can not issue until a pluries is issued and returned into the King's Bench or the Common Pleas, when a judicial writ may issue. Any of these suits are removable by either party into the King's Bench or Common Pleas, to be there determined. If the replevin be by writ in the county Court, it must be removed by a *pone*; if by plaint, it must be removed by a *recordari facias loquelam*; if in a Court of record that may hold pleas in replevin, it must be removed by a writ of *certiorari*; and if in the Court of another lord, it may be removed by *recordari* to the sheriff.

This much of the law of England is stated to show that

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there can be no replevin under either the common law, or the statute of Marlbridge, without the aid of our statutes. The English law is founded on the usages and customs of that kingdom, growing out of the relation of landlord and tenant under the feudal system and the aristocratical doctrines of primogeniture, and is local to that kingdom and can not be in force here. There are no two kinds of replevin in this state as in England, one by plaint and another by writ; nor is the writ in replevin liable to be defeated by a claim of property as it is in England, where such claim as before observed puts an end to the suit, unless it is revived by the writ *de proprietate probanda*. Our writs of replevin are returnable writs, and the party is required to appear on the return day. They issue out of the Circuit Courts as other writs do, and are there returnable; and the suit is docketed, proceeded in, set down for trial and *tried, agreeably to the laws and practice of the Court as other actions are. The statute of Westminster 2, (13 Ed. 1. st. 1.) chap. 2, is applicable only to actions of replevin founded on a distress for rent, and is not of a general nature, but is local to that kingdom and inconsistent with the laws, practice, and policy of this state, and therefore not in force. The Court, therefore, considers the plea of the defendant in this behalf insufficient in law to bar the plaintiff's action, and that the Circuit Court erred in overruling the demurrer thereto.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Huntington and Cone, for the appellant.

Farrington and Kinney, for the appellee.

(1) The action of replevin, in this state is not confined, as it is in England, to cases where there has been an *actual and wrongful taking* of the plaintiff's goods; but it lies, also, in cases where the goods of another are *lawfully acquired and unjustly and unlawfully detained*. Vide R. C. 1831, p. 424; *Chinn v. Russell*, ante, p. 172, and note 3; *Parsley v. Huston*, May term, 1834.

HOWELL v. WILSON.

INDORSEMENT—CONTRACT OF.—The indorser of a note, under our statute, warrants two things: 1st, that the note is valid and the maker *liable* to pay it; 2dly, that the maker of the note is solvent and *able* to pay it.

FORMER ADJUDICATION—INDORSER—PARTIES.—If the indorsee sue the maker, and fail on the ground that the note had been obtained without consideration, the indorser is not bound by this judgment against the validity of the note, if notice was not given him of the pendency of the suit. But the indorser may show, in bar of an action against him by the indorsee under those circumstances, that the consideration of the note was a good one.

INDORSER—LIABILITY—RIGHT OF INDORSEE.—The indorsee of a note, obtained from the maker without consideration, has a right, as soon as he discovers the imposition, to sue the indorser for having assigned him a note which the maker is not liable to pay.

ERROR to the Parke Circuit Court.

BLACKFORD, J.—Wilson, the assignee of a note, brought an action of assumpsit against Howell, the assignor. It was proved on the trial that a note for the payment of money, given by Coleman Puit to Howell, had been assigned by the latter for a valuable consideration to Wilson; and that an action by Wilson, the assignee, against Puit, the maker, had been defeated by a plea of a [*419] failure of consideration. The defendant,*Howell, in the present action against him on the assignment, offered to prove that the consideration of the note was valid, and had not failed; but the evidence was rejected. The cause was submitted to the Circuit Court, and a judgment rendered in favor of Wilson, the plaintiff below.

One of the errors relied on by Howell, the plaintiff in error, is, that the testimony he offered ought to have been admitted.

When a man assigns a note to another, he warrants two things: *first*, that the note is valid and the maker *liable* to pay it; *secondly*, that the maker of the note is solvent and *able* to pay it. Cases of the latter kind are common;

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but the one before us is the first of the former kind that we have had occasion to examine.

The principle which must govern our decision is a plain one. Howell can not be made liable for having assigned a note, on the ground that he had obtained it without consideration, unless he have an opportunity to establish the validity of the note. If Wilson, after having sued Puit, the maker, had given notice to Howell of the pendency of the suit, the latter might have attended at the trial, and endeavored to support the note. In that case Howell would have been bound by the judgment in favor of Puit. But as no such notice is pretended to have been given to the indorser, he is not to be precluded by the proceeding against the maker, which, as to him, is *res inter alias acta*. *Maupin v. Compton*, 3 Bibb, 214.

If, however, the facts are as Wilson states, and this note was really obtained by Howell from Puit without a valid consideration, Wilson had a right, as soon as he discovered the imposition, to sue Howell for having assigned him a note, which the maker was not liable to pay. *Caton v. Lenox*, 5 Rand. 31. The present action, therefore, is not to be barred, as contended for by Howell, merely because no notice was given him of the pendency of the suit against Puit. The cause stands upon the same ground on which it would have stood had there been no previous suit against the maker of the note. And Wilson's success must depend upon the decision of the question, whether Puit was liable or not for the note at the time of its assignment by Howell.

This view of the subject shows that Howell had a right, in the suit against him by Wilson, to prove that [*420] the consideration *of the note was a good one, and had not failed as Wilson contended. We are informed by the record that evidence of this kind was offered by Howell, and rejected by the Circuit Court. The judgment against him is consequently erroneous, and must be reversed.

Kelly v. Duignan and Another.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Hester, for the plaintiff.

Kinney, for the defendant.

KELLY v. DUIGNAN and Another.

AMENDMENT—CONTINUANCE.—A declaration in covenant, not showing the writing declared on to be under seal, was amended by the insertion of words describing the instrument as a writing obligatory. *Held*, that this was an amendment in substance, and entitled the defendant, under the statute, to a continuance.

ERROR to the Owen Circuit Court.—Covenant by Duignan and Boggs against Kelly. Demurrer to the declaration and judgment for the plaintiffs.

M'KINNEY, J.—Action of covenant for the payment of 800 gallons of whisky. The declaration contains one count. On the calling of the cause, the plaintiff obtained leave to amend his declaration. The amendment consisted in making profert, and introducing the words "by his certain writing obligatory," as essentially descriptive of the instrument. The defendant, upon the amendment being made, moved the Court to continue the cause, alleging the amendment to be of substance. The Court refused a continuance, and to its opinion the defendant excepted. We think the latter amendment was of substance. The action of covenant can only be brought upon a sealed instrument. The words "by his certain writing obligatory," or other words importing a specialty, are essentially necessary to be introduced into the count as descriptive of the instrument. Without these words, profert, a matter of form, would have been unnecessary, and the cause proceeding to judgment, would have been arrested or reversed on error. The defendant can claim, as a matter of right, a continuance when a substantial amend-

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[*421] ment has been made. *Ewing and others v.*French*, 1 Blackf. 170; Rev. Code, 1824, p. 295. The refusal to continue the cause is error, and meeting us *in limine*, renders it unnecessary to advert to the subsequent proceedings.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Hester, for the plaintiff.

Naylor, for the defendants.

O'BRIEN and Another v. COULTER and Others.

CREDITOR'S BILL—PROPERTY NOT SUBJECT TO EXECUTION—EQUITABLE REMEDY.—It is a general rule, that to reach the equitable interest of a debtor in real estate by a suit in chancery, the creditors should first obtain a judgment at law; and to reach personal property, both a judgment and execution must be shown. One exception to this rule is, where the debtor is deceased; another exception is, where the claim is to be satisfied out of a fund accessible only by the aid of a Court of chancery.

FRAUDULENT CONVEYANCE.—A person indebted to several others and in insolvent circumstances, executed a conveyance of his real estate to his children, in consideration of a nominal sum and of natural love and affection, and with an intent to defraud his creditors. Two of the grantees were daughters and afterwards married. The grantor continued in possession, contracted other debts subsequently to the deed, and died insolvent. *Held*, that the conveyance was voluntary, and fraudulent and void as to the creditors of the grantor.

TAX SALE—EVIDENCE.—If the sale of town lots for taxes was authorized by the revenue act of 1818 (which is doubtful), the validity of a sale under the act can only be established by legal proof that the law had been strictly complied with.

SAME—JUDICIAL SALE—SALE IN PARCELS.—Two town lots, one with a house on it, the other unimproved, worth 400 or 500 dollars, were sold together for a tax of 4 dollars. *Held*, that the sale under those circumstances was illegal.

PRESUMPTION—TIME—PAYMENT.—After a lapse of 20 years, without any acknowledgment of the debt, the payment of a writing obligatory may be presumed.

THIS was a suit in equity, transferred from Knox Cir-
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cuit Court previously to a decree, in consequence of the interest of the Circuit Judge.

STEVENS, J.—The material facts in this case as disclosed by the bill, answer, exhibits, and depositions, are these: One Thomas Coulter, late of the town of Vincennes, in the county of Knox, some time in the year 1826, departed this life intestate, leaving, surviving him, one son, John Coulter, and three daughters, that is, Matilda, married to John Pitcher, Rosantte, married to Christian Graeter, and Ellen, married to Manual Rue, the above defendants. The intestate, in his life-time, became indebted as *follows: To Jacob Kuykendall, by writing obligatory bearing date the 15th day of October, 1800, in the sum of 50 dollars, payable in 30 days; also, in the further sum of 11 dollars and 75 cents, by writing obligatory bearing date the 8th of July, 1809, payable the 1st day of August, 1809. To Thomas Jones, by writing obligatory, bearing date the 26th day of August, 1816, in the sum of 30 dollars. To Hyacinth Lasselle, by judgment rendered by Christian Graeter, a justice of the peace, on the 20th day of January, 1820, for 5 dollars and 41 cents debt and 3 dollars and 37 cents costs. And to Dr. Elias M'Namee, by open account for medicine and medical services, in the sum of 220 dollars and 75 cents, as follows: in the year 1819, 9 dollars and 25 cents; in the year 1820, 54 dollars and 50 cents; in the year 1821, 7 dollars; in the year 1825, 125 dollars; and in the year 1826, 25 dollars; making the sum of 220 dollars and 75 cents.

In the year 1817, the intestate was much indebted and wholly insolvent, but was the owner by legal title and possessor of a house and lot on the corner of Second and Vigo streets, in the town of Vincennes, being half of lot No. 81, and a part of lot No. 80, worth at that time 400 or 500 dollars; and on the 8th day of February, 1817, he conveyed by deed in fee-simple with warranty to his children, John, Matilda, Rosantte and Ellen Coulter, four

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of the above defendants, the aforesaid house and lot and the part of lot No. 80, for and in consideration of 5 dollars and natural love and affection. He continued to use and occupy the property as his own, and enter it on the list of the tax assessor, and pay tax thereon as his own, until in the year 1823, when the whole was sold by the tax collector for the taxes and costs for the year 1823, amounting to the sum of 4 dollars; and was for that sum purchased by John Pitcher, one of the defendants and a son-in-law of the intestate, who received a tax collector's deed or certificate therefor. Pitcher occupied the house with the intestate, his father-in-law, at the time of the sale and purchase, and they continued so to occupy it together until the intestate's death, and Pitcher has ever since continued to occupy it. The intestate died totally insolvent, leaving no personal property whatever, nor any real estate excepting the house and lot and part of a lot aforesaid, so deeded and conveyed to his children and sold for taxes as aforesaid, and no letters of [*423] administration *have ever been taken out on his estate, there being nothing to administer on. Pitcher, in his answer, insists on his tax-title, and sets up in bar of the complainants' claims, the statute of limitations and the presumption of payment from lapse of time. The other defendants have failed to answer, and the bill as to them is taken for confessed.

The first objection raised is, that the complainants are not judgment creditors. It is the general doctrine, certainly, that to reach the equitable interest of the debtor in real estate by a suit in chancery, the creditor should first obtain a judgment at law; and to reach personal property, both a judgment and execution must be shown. *Brinkerhoff v. Brown*, 4 Johns. Ch. Rep. 671; 1 Har. Chan. 116; 1 Vern. 398; 1 P. Will. 445; 3 Litt. Rep. 12. One exception to this rule is, where the debtor is deceased. *Thompson et al. v. Brown et al.* 4 Johns. Ch. Rep. 619; *Sweny et al. v. Ferguson*, May term, 1828. And, again,

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Chief Justice MARSHALL, in the case of *Russell v. Clark's Executors*, 7 Cranch, 89, says "that if a claim is to be satisfied out of a fund, which is accessible only by the aid of a Court of chancery, application may be made, in the first instance, to that Court, which will not require that the claim should be first established in a Court of law." This principle forms a second exception to the general rule; and this case comes within both these exceptions. The complainants in this case come in as creditors of the intestate, showing that they have no complete remedy at law, and charging that the conveyance of the intestate to his children, as to them, is fraudulent and void, and that the tax-title to Pitcher is not only illegal, but also fraudulent and therefore void. They pray to have these conveyances set aside and rendered null and void, and that general and proper relief be granted them in the premises. The writings obligatory, judgment, and accounts, are all exhibited, and satisfactorily established.

The deed of the intestate to his children was clearly a voluntary conveyance, and no principle is better settled than the doctrine, that voluntary settlements made by a man indebted and in insolvent circumstances, are fraudulent and void against creditors, particularly so, if made with a fraudulent intent or with a view to after pecuniary difficulties. *Reade v. Livingston*, 3 Johns. Ch. [*424] Rep. 481; *Bayard v. Hoffman*, 4 Johns. Ch. *Rep. 450; *Sexton v. Wheaton*, 8 Wheaton, 229; *Hinde v. Longworth*, 11 Wheat. 199. The conveyance in this case, it is averred by the complainants in their bill, was made by the intestate at a time when he was indebted and totally insolvent, and with a fraudulent intent as to his creditors. These allegations are not denied by the defendants, and, if they were denied, the exhibits and depositions clearly prove them to be true. It is objected, that although the conveyance was voluntary and void in its creation, yet that two of the daughters having since married, the character of the transaction as to them is

changed; that marriage is the highest consideration known to the law; and that so far as these two daughters are concerned the conveyance is good, being by the marriage placed on the footing of purchasers for a valuable consideration. This as a general proposition is correct, but when applied to the case under consideration, as presented by the bill, answer, exhibits, and depositions, it has no application and can not change the features of the transaction.

The next consideration is the tax-title of Pitcher. It may, perhaps, be necessary in the outset to premise, that whenever any authority is given to any person or officer by law, whereby the estates or interests of other persons may be forfeited and lost, such authority must be strictly pursued in every instance. *Yancey v. Hopkins*, 1 Munford, 419. In the case of *Ronkendorff v. Taylor's lessee*, 4 Peters, 349, it is decided, that in these *ex parte* sales, such as the sale of land for taxes, great strictness is required. Every substantial requisite of the law must be complied with. No presumption can be raised in behalf of the collector to cure any radical defect in his proceedings; and the proof of regularity devolves upon the person who claims under the collector's sale. The sale, in this case, was made under the provisions of the revenue act of 1818, and the only proof offered to establish that the requisites of the act were complied with, is the deed of the collector. If it be admitted that the averments and statements in the collector's title, like those in the deed of a sheriff, are to be taken for true until the contrary is proven, yet there is not a sufficiency of evidence in this case produced to satisfy the Court that the substantial requisites were complied with. These requisitions are plainly delineated in the act, and those wishing to establish the

[*425] validity of the *sale are bound to satisfy the Court by legal proof, that there has been a strict compliance therewith. The collector's title in this instance does not sufficiently prove those facts. It is also

doubted whether the statute of 1818 authorizes the sale of town lots for taxes. Some of the most correct legal characters in the state have had very strong doubts. The Court however, on that point gives no opinion. Again, those lots with their improvements appear to have been sold in one lot for the trifling sum of 4 dollars. The law governing the sales of sheriffs on execution is, that so much only of the defendant's property shall be sold at one time, as a sound judgment would dictate to be sufficient to pay the debt, provided the part selected can be conveniently and reasonably detached from the residue and sold separately. *Reed v. Carter*, 1 Blackf. Rep. 410; *Tiernan v. Wilson*, 6 Johns. C. Rep. 411 (1). A part of this property could have been conveniently and reasonably selected and detached, being in two separate lots of land, one with a house on it and the other without any buildings.

Pitcher, in his answer, admits the writings obligatory exhibited to be genuine, but alleges they must have been paid, and relies on the lapse of time for proof. That after a lapse of 20 years, without a promise to pay, payment may be presumed, is correct; but no such presumption can apply in this case, the intestate having acknowledged the debt and promised payment within three years of the time of his death, as appears by the depositions.

From these views of the case the Court thinks that the conveyance from the intestate to his children is fraudulent and void as to creditors, and that Pitcher's tax-title is illegal and conveys no title, and that the complainants have equity and are entitled to relief.

Per Curiam.—It is decreed that the conveyance of the intestate, and the tax-title of Pitcher, be set aside, &c.; that the lots be sold, &c.; and that the commissioner report, &c.

Judah, for the complainants.

Hall, for the defendants.

(1) *Reed et al. v. Carter*, May term, 1834, post. 3 Blkf. Rep. 376.

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MISTAKE—REMEDY—PRINCIPAL AND AGENT.—A., being the agent of a county, sold certain town lots belonging to the county to B., and gave him a title-bond for the same. The bond was, by mistake and contrary to the intention of both parties, so drawn and executed as to appear obligatory on A. personally. *Held*, that the mistake could not be pleaded in bar to an action at law against A. on this bond (a).

SAME—REFORMATION—REMEDY.—*Held*, also, that after a judgment obtained against A. on the bond, he might, by a bill in chancery, have the judgment enjoined, and the mistake in the bond corrected; but that the county as well as B. must be made a party to the suit.

PRACTICE—DEMURRER.—*Held*, also, that if a demurrer to a bill for want of proper parties be sustained, the bill should not be dismissed; but the cause be ordered to stand over for a reasonable time, with leave to amend the bill.

ERROR to the Orange Circuit Court.

BLACKFORD, J.—This is a bill in chancery by William Lindley, executor of Jonathan Lindley, deceased, against Jane Cravens, administratrix of William Cravens, deceased.

The bill states that Jonathan Lindley, having been appointed agent of Orange county, sold, in his capacity of agent, at public vendue, certain lots of ground, the property of the county, situate in Paoli, the seat of justice; that three of the lots were purchased by John Austin, for which said Jonathan, in his capacity of agent, executed to the purchaser a title-bond, in substance as follows:

“I. Territory, Orange county. Know all men by these presents that I, Jonathan Lindley, lawful agent for the town of Paoli, am held and firmly bound unto John Austin in the penal sum of 157 dollars and 50 cents; to which payment I bind myself, my heirs, and every of them, to be made and done. Witness my hand and seal, April 9th, 1816. The condition of the above obligation is such, that if the above bounden Jonathan Lindley doth make a deed unto John Austin for lots Nos. 78, 21 and 28, in the town

(a) See 49 Ind. 434; 40 *Id.* 366; 9 *Id.* 126.

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of Paoli, as soon as he can obtain a deed for the same. In failure thereof, the above obligation to stand in full force and virtue in law. The date above written.—Jonathan Lindley (Seal).”

The bill further charges that the said Jonathan, by this bond, intended to bind himself as county agent and not personally; that he inserted by mistake therein [*427] the term heirs instead of *successors in office, and used the words agent for the town of Paoli, instead of agent for the county of Orange. It is also stated that the consideration-money for these lots was paid by the purchaser to the said Jonathan, as agent of the county, and by the latter paid over to the county; that the said Jonathan personally never had any interest in the lots; and that it was the clear understanding of the parties at the time of the contract that the said Jonathan was contracting as agent as aforesaid and not individually. It is further stated that, some time after the execution of the bond, Austin received from the said Jonathan, as agent of the county, a deed for two of the said lots, and indorsed a receipt for it on the title-bond; that Austin afterwards assigned the bond, as to the third lot, to William Cravens, who has since died; and that Jane Cravens, the assignee's administratrix, has recovered a judgment on the said title-bond against William Lindley, executor of the said Jonathan, to be levied of the goods of the testator—the Court having overruled the defendant's plea, which averred the *mistake* in the bond. It is also stated that the circumstances attending the execution of the bond, and the intention with which it was executed, were well known to William Cravens at the time of the assignment. The bill prays an injunction of the judgment, and general relief.

To this bill the defendant below demurred, and set out as causes of demurrer, 1st, that the bill contains no equity; 2d, that the county of Orange should have been a defendant. The Circuit Court sustained the demurrer—dissolved

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the injunction which had been granted in vacation—and dismissed the bill.

The defendant in error contends that the merits of the bill were decided in the action at law, and can not be investigated again by a Court of chancery. She contends, also, that the county of Orange is interested, and should have been a party to the bill.

The statement of the bill is, that the bond was intended by the obligor and obligee to be an official bond, obligatory only on the county of Orange; but that, *by mistake*, the bond was drawn so as to appear to be binding on the obligor personally. The remedy of the complainant, under the circumstances which he states, can only [*428] be by procuring the alleged mistake *in the bond to be corrected. To effect this purpose, he is compelled to resort to a Court of chancery. The mistake in the bond could not be pleaded by the complainant, in the action at law brought against him on the bond; and the Court in which the plea to that effect was offered very correctly overruled it. The judgment at law, therefore, against the complainant, is no bar to this proceeding in chancery.

The second objection made to the suit in chancery is a good one. We have already observed, that the complainant's relief was by procuring the mistake in the bond to be corrected. If he can effect that object, he not only discharges the estate of Jonathan Lindley from the obligation, but he makes the county of Orange a party to it, and liable to comply with its condition. A Court of chancery, certainly, will not make such an alteration in this bond, without giving to the county an opportunity of showing, that the alteration ought not to be made. The complainant is mistaken in supposing that the Court will relieve him, without going any further. If he obtain a decree, correcting the mistake in the bond and enjoining the judgment against him, the same decree must establish the liability of the county of Orange on the bond. The re-

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lief, therefore, claimed by the complainant, can not be obtained by him, unless the county, which is to be so materially affected by the decree, be made a party to the suit. The bill, therefore, was not sufficient for the accomplishment of its object, on account of the want of proper parties. For this objection, however, the bill should not have been dismissed in the first instance. On sustaining the demurrer, the Court should have ordered the cause to stand over for a reasonable time, with leave to the complainant to amend his bill. 2 Madd. 142. The decree dismissing the bill must, therefore, be reversed, and time be given to amend.

Per Curiam.—The decree is reversed. Cause remanded, &c.

Farnham, for the plaintiff.

Dewey, for the defendant.

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ARREST—JUSTIFICATION—PLEADING.—Trespass and false imprisonment.

Plea, that the plaintiff, by his false representations respecting the circumstances of a third person, had induced the defendant, then in Louisiana, to sell there on a credit to such person a boat laden with corn; that the plaintiff and the purchaser absconded without paying for the corn, and were fugitives from justice; that the defendant, for these reasons, made oath before a justice in this state, that the plaintiff and the purchaser had swindled him out of the price of his corn; that a warrant for swindling was accordingly issued by the justice against the parties complained of, upon which the plaintiff was arrested, taken before the justice, and by him committed to gaol, which is the same trespass, &c. *Held*, on demurrer, that the plea was insufficient (a).

ERROR to the Gibson Circuit Court.

M'KINNEY, J.—Trespass and false imprisonment. The declaration contains three counts. The two first general, the third special. Plea of not guilty, and two special

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pleas of justification. To the special pleas, the plaintiff filed a special demurrer. The demurrer was overruled, and judgment rendered for the defendant.

The causes of demurrer are, 1st, no legal warrant authorizing the imprisonment; 2d, no offence in the affidavit on which warrant issued; 3d, justice had no jurisdiction of the offence, if any. It is averred in the special pleas, both of which are directed to the same ground of defence, that the defendant was swindled out of 860 dollars and 50 cents, in the state of Louisiana, by the false representations of the plaintiff. They consisted in the plaintiff's representing that one Overfield, of that state, owned some negroes and a tavern stand in Donaldsville, and was fit and worthy to be trusted; that, in consequence of such representations, the defendant was induced to trust, and did trust Overfield with a boat of corn; that Overfield did not own the property represented; that he was not fit to be trusted; and that he absconded without paying defendant for his corn. It is also averred that the plaintiff absconded and was a fugitive from justice; and that the defendant, in pursuance of a statute of this state concerning "fugitives from justice," went before a justice of the peace and made an affidavit, "that he had been swindled out of 860 dollars and 50 cents by Overfield and Hall, plaintiff; that upon such affidavit a warrant was [*430] issued against *Overfield and Hall, plaintiff, for swindling; that Hall was arrested, taken before a justice of the peace, and by him committed to jail; which are the same trespasses, &c.

The statute of this state, authorizing the arresting and securing "fugitives from justice," provides for its action only in the event of a crime committed. The distinction between crimes and misdemeanors does not warrant the application of the former grade of offence to the act, to which the 18th section of our statute relative to crime and punishment applies. Upon such application, the pleas are attempted to be supported. Admitting, how-

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ever, the application, the pleas are insufficient. They do not bring the acts of the plaintiff within the operation of that section. The false representation of the solvency of another is the ground of a civil action. The charges in the pleas amount to nothing more. A crime is not charged to have been committed in Louisiana. If no crime was committed in that state, a commitment in this can not be justified. The term "swindling," the charge made in the affidavit and in the warrant, is vague and indefinite. It does not import a crime. Such a charge is not actionable, not being a punishable offence. The affidavit not charging a crime is insufficient; the warrant pursuing its terms does not justify the arrest; the imprisonment was illegal. The jurisdiction of a justice of the peace is limited. When that jurisdiction is transcended, responsibility attaches, and everything done is void. This principle applies, whether the want of jurisdiction embraces the subject-matter or the person. *Wise v. Withers*, 3 Cranch, 331; *Perkin v. Proctor*, 2 Wils. 382; *Mostyn v. Fabrigas*, Cowp. 161.

The pleas are insufficient. Judgment should have been rendered in favor of the plaintiff.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Hall, for the plaintiff.

Judah and *Battell*, for the defendant.

[*431] *MODISETT and Another v. JOHNSON and Others.

JUDGMENT LIEN—LAND HELD BY TITLE-BOND.—A judgment is no lien on land, which the debtor holds by a bond conditioned for the execution of a title on payment of the purchase-money, though he had taken possession and paid the money before the rendition of the judgment and a sheriff's sale, on execution against the obligee, of land so held, conveys no estate to the purchaser (a).

(a) 45 Ind. 489; 21 *Id.* 112; 20 *Id.* 481; 8 *Id.* 533; 6 *Id.* 380.

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SAME—SALE OF EQUITY—INTEREST.—The statute of frauds, authorizing the sale of lands on execution against a *cestui que trust*, does not extend to equitable interest possessed by the obligee of a title-bond.

SPECIFIC PERFORMANCE—REQUISITES.—Upon an application to the Court of equity, for a specific execution of a contract for the sale of land, the Court must be satisfied that the claim is reasonable and just, and the contract equal in all parts, and founded on an adequate consideration. If any of these points be not established by the complainant, he will be left to his remedy at law.

APPEAL from the Vigo Circuit Court.—Bill in chancery by Johnson and others against Modisett and Clarke Decree of the Circuit Court for the complainants.

STEVENS, J.—The facts in this case, as exhibited by the bill, answers, exhibits, depositions, and record are substantially these:

In May, 1824, judgment was rendered in the Vigo Circuit Court against Charles B. Modisett, the debtor, and Thomas H. Clarke, his surety, in favor of Cuthbert Bullitt, surviving partner of the late firm of C. & T. Bullitt, for the sum of 847 dollars and 82 cents; which judgment was replevied, under the statute, by John M. Coleman. In May, 1825, a writ of *fi. fa.* issued, and was levied by the sheriff of the county on some of Modisett's personal property, which sold for 159 dollars and 50 cents; and, at the same time, the sheriff levied the same *fi. fa.* on 5 out lots and 24 in lots of the town of Terre Haute, in the county of Vigo, as the property of Modisett, among which were the lots in question in this case, to wit, in lots 18, 248, and 286, and out lots 42, 26, and 15—all of which lots were returned not sold. In July, 1825, a venditioni exponas issued, and all said in and out lots, except one in lot numbered 257, were sold by the sheriff for the sum of 39 dollars and 60 cents. The in lots 18 and 286, and the out lots 42, 26, and 15, were purchased by said Daniel H. Johnson and one Robert Wilson for 21 dollars and 62½ cents, and the in lot 248 was purchased by one [*432] Edward Madden *for one dollar, which lot the said Madden afterwards sold to said Johnson and Wilson.

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At the time those lots of land were levied on and sold, they were in the possession of Modisett, and held by him by bonds on the proprietors of the town, conditioned for the conveyance by deed of the lots when the purchase-money should be paid. Modisett had no deeds for said lots or any of them. The purchase-money on in lots 248 and 287, and perhaps on out lot 42, was paid, but the purchase-money for in lot 18 and out lots 26 and 15 was not paid. Before the sale of any of the lots took place, Modisett offered to give up to the sheriff in lieu of said lots, goods and chattels worth at least 1,700 dollars; and he showed the sheriff a schedule of the goods and chattels, and offered to give good bond and security for the delivering thereof on the day of sale; and the sheriff refused to receive them, stating that he should first sell the lots, as they had been shown to him by the plaintiff's attorney, Mr. Farrington. On the day of sale of the lots, before any of the lots were sold, Modisett publicly informed all the persons at the sale that he had offered goods and chattels in lieu of the lots, and that the sheriff had refused to take them, and that he had no title to the lots, and hoped no person would buy them, as he did not wish any person to pay money for him for nothing. And after the sale was over, and before any money was paid to the sheriff, Modisett again informed those who had purchased, that he had no title and that he did not wish them to pay money for him for nothing; that if they would relinquish their bids he would pay the amount to the sheriff. Many of the purchasers did relinquish their bids, and Modisett paid the amount of those bids so relinquished. But Johnson, Wilson, and Madden, refused to relinquish theirs; paid their own bids; and took deeds from the sheriff for the lots they had purchased, being the lots now in controversy. The whole of the lots levied on and sold were, at the time of the sale, worth upwards of 1,200 dollars, and in 1829 were worth 2,800 dollars; and in lots 18, 248, and 286, and out lots 15, 26, and 42,

were at the time of the sale worth 105 dollars, and, in 1829, were worth between 500 and 600 dollars cash in hand. And Modisett and his replevin-surety, John M. Coleman, were each solvent, and had a sufficiency of both real and personal property to pay the amount of [*433] the *execution on which those lots were sold.

In 1826, Thomas H. Clarke purchased of Modisett the in lot 286, and out lots 15, 26, and 42, for 430 dollars, and took an assignment from Modisett of the title-bonds on the proprietors of the town for deeds, from whom he has since received deeds for the out lots, but not for the in lot, At the time of the purchase, Modisett put Clarke into possession, which possession he still holds, and the lots have been much improved since the sale thereof by the sheriff, both by Modisett and Clarke.

The complainants allege in their bill that all the lots levied on and sold were paid for at the time of the sale, and that Modisett was at that time entitled to deeds therefor, and that he neglected and delayed taking deeds for the purpose of defrauding his creditors. They further allege that Clarke had full notice of the premises, and that the sale from Modisett to Clarke was and is voluntary and fraudulent, and was made for the purpose of defrauding the complainants out of their rights, and pray the Court for special and general relief. Modisett in his answer expressly denies that he delayed and neglected perfecting his title to those lots for the purpose of defrauding his creditors; but says that he was not entitled to deeds for any except three; and that for the purpose of saving expense, he wished all his lots to be conveyed by one deed, and was merely waiting until they all should be paid for, so as to include them all in one deed; that he was always able to pay his debts and did pay them. He also denies all fraud. Modisett and Clarke both expressly aver that the sale and transfer by Modisett to Clarke of the aforesaid lots were *bona fide*, and for a valuable consideration; and that Clarke had no notice whatever, of

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any description, of the aforesaid sheriff's sale, or that there was any claim or incumbrance of any description on the lots when he purchased and took the transfers and possession from Modisett. And they both deny that the complainants have either a legal or an equitable title to either the possession or fee simple of the property. They also deny all fraud. It appears of record that Robert Wilson, the original purchaser at the sheriff's sale, is dead, and that Martha Wilson is his widow, and Melinda Johnson and Ralph Wilson, the above appellees, are his children and heirs, and are therefore admitted as parties to the suit.

The cause was heard in the Vigo Circuit Court, [*434] and a final *decree rendered in favor of the complainants, requiring Clarke to surrender up possession to them of the ont lots, and convey the same to them by deed, and also surrender possession to them of in lot 286, and transfer to them, by assignment, the title-bond on the proprietors of the town for a deed for the same; and that Modisett should surrender up possession of in lot 248, and transfer to them, by assignment, the title-bond on the proprietors for a deed thereto; and that Modisett and Clarke pay costs, &c. To reverse which decree this appeal is prosecuted.

The complainants bottom their claim to the aid of a Court of equity, in part, upon a charge of certain intentional fraudulent acts of Modisett. They allege that he neglected and refused to take deeds for the lots in question, from the proprietors of the town, for the purpose of defrauding his creditors. This charge Modisett most positively in his answer denies, and accounts for the delay satisfactorily. There is no evidence to sustain the charge, and the circumstances connected with the transaction go very strongly to contradict the idea of such intention. Modisett was solvent and finally paid off his debts, and was possessed of a large personal property, and also a valuable house, in all amply sufficient to pay his

debts; all subject to be seized and sold at any moment. And the judgment, for the satisfaction of which the lots in question were sold, was secured by replevin-surety, who was solvent, and who resided in the same place, and had more than a sufficiency of property to satisfy the execution at any moment, subject to be seized and sold whenever the sheriff pleased to take it. Hence, Modisett could have neither interest nor inducement to endeavor to protect those lots from his creditors.

The charge of fraud being disposed of, the case presents for the consideration of the Court two questions. First, had Modisett an interest in these lots at the time of the levy and sale thereof, subject to be seized and sold on an execution of fieri facias? Secondly, if so, are the complainants entitled to the aid of a Court of equity, to perfect their possession and title to the same, under the whole circumstances and facts of the case?

At common law, equitable interests are not the subject of execution; but the 10th section of the act for the prevention of frauds and perjuries converts them [*435] into legal estates, and a judgment at law is a lien and they become liable to execution. *Buford v. Buford*, 1 Bibb, 305: *Bogart v. Perry et al.*, 1 Johns. C. R. 52. This statute is copied from the English statute, and only applies to those fraudulent and covinous trusts, in which the *cestui que trust* has and enjoys the whole real and beneficial interest in the land, and the trustee has the mere nominal, naked, and formal legal title, vested in him for the sole and only use and benefit of the *cestui que trust*. It is clear, however, that the statute only operates upon trusts declared by deeds of conveyance properly so called. Such trust must arise from some deed or conveyance. As if A. purchases land from B. and pays for it with his own money, and B. deeds the land to C., there is a resulting trust from C. to A., because B. the vendor conveys for the use of A. the vendee. *Jackson v. Morse*, 16 Johns. Rep. 199. In such case, the statute which subjects it to

execution and sale, attaches the instant it is levied on and sold, and executes the trust and converts it into a legal estate, or, in other words, strikes the name of C. out of the deed, and inserts the name of the *cestui que trust*, for whose use the deed was made in the first instance. But until the contract with B. was consummated by a conveyance, A. had no legal or executed estate entitling him to be regarded as seized. His right, until it was merged in the deed to C., was a mere chose in action; and his remedy, had B. refused to convey, would have been in equity to compel a specific execution of the contract, or by a suit at law for his damages. Per Judge SPENCER, in the case of *Jackson v. Morse*.

It is essential from the very words of the statute to the contemplated trust, that it should arise from a deed or conveyance. The statute never was intended to apply to a case where the trustee was not directly seized for the sole use and benefit of the *cestui que trust*. *Bogart v. Perry et al.*, 17 Johns. Rep. 351; *Botsford v. Burr*, 2 Johns. C. Rep. 414. After a man has purchased land with his own money for his own use, and takes a conveyance to himself, a subsequent purchase for him of those lands can not, by any retrospective effect, produce the trust contemplated by the statute. It may be a good ground for another kind of relief, but it can not be that kind of a trust which the statute, upon a seizure and sale under an execution, executes and converts into a legal estate. The trust [*436] must be *coeval with the conveyance, and can not be raised by an after transaction. The provisions of the statute are, that on such sales the land shall be held and enjoyed, "freed and discharged of all incumbrance of the trustee;" which at once shows, that there must be a conveyance passed to some person for the use and benefit of the *cestui que trust*, or those holding under him can not have the legal title vested in them, simply by the destruction of the trustee's legal title. There must be either an absolute legal estate, or an interest vested, known, and

acknowledged at law, before a judgment at law can be a lien on it. A judgment at law is not a lien on a mere equitable interest in land, and an execution under it will not pass an interest, which a Court of law can not protect and enforce. *Bogart v. Perry et al.*, 1 Johns. C. Rep. 52.

The complainants have placed great reliance on three cases in Wendell's Reports, and one in Cowen's. 1. The case of *Forsythe v. Clark*. 3 Wend. 637. This case is not in its details directly in point, but the judge in his argument lays it down as a principle, that where the contracting parties, after a contract for the purchase of an estate, and the payment of the consideration-money, but before the execution of a deed, conspire together to defraud the creditors of the vendee, a Court of chancery may, on a bill filed by a creditor, grant relief. As there is no fraud or collusion in this case charged between Modisett and the proprietors of the town of Terre Haute, at or before the sale of the lots in question, the doctrine laid down in the case of *Forsythe and Clark* is not applicable. 2. The case of *Jackson v. Walker et al.*, 4 Wend. 462. This is a case of trust within the statute, created directly by deed, and for a fraudulent purpose, and therefore can not aid the complainants in this case. 3. The case of *Jackson v. Bateman*, 2 Wend. 559. This case may be thought to have some bearing upon the present discussion. The relief sought in the case is similar to the relief sought in the one now under consideration, and Judge MARCY, in laying down what he thinks the true doctrine in such cases is, says that there must be such a trust as the statute can execute and convert into a legal estate on which the judgment can be a lien, or it is not subject to execution. This is certainly the true doctrine, and it is in applying that rule, the difficulties and apparently conflicting opinions arise.

[*437] *The fourth and last case is *Jackson v. Parker*, 9 Cowen, 73. The decision in that case appears to be in favor of the complainants; but the learned judge,

in giving his opinion, has favored us with the premises from which he draws his conclusions, and thereby has enabled us to form our own judgment from the same premises. The opinion was delivered by Judge SAVAGE; and he sets out by saying that a judgment at law is not a lien on a mere equitable interest in land; and the execution under it will not pass an interest, which a Court of law can not protect and enforce. There must be (he says) either an interest known and recognized at law, or an equitable interest within the meaning of the statute. If he had stopped here, he would have only reiterated the uniform current of decisions on those cases, both in America and England. But he goes further, and says that an equitable interest, coupled with possession, may be executed and sold; for (says he) the interest of the mortgagor or mortgagee in possession, is bound by a judgment and may be sold; but, out of possession, neither has an interest upon which the lien of a judgment can attach. The case which the judge has given, it is apprehended, will not sustain the doctrine it was introduced to establish. In the case of a mortgage, the parties are placed on peculiar grounds, growing out of the relation in which they stand as it respects each other's rights. Technically, the legal estate would seem to vest in the mortgagee upon the execution of the mortgage, subject to be defeated by a strict performance of the condition. But in practice it is the settled doctrine in equity, and the Courts of law have long since adopted the same doctrine, that the mortgage is a mere security, and that the mortgagor as to all the world except the mortgagee, is the real owner and a freeholder, with the civil and political rights belonging to that character; that the equity of redemption is the real estate and tantamount to a fee at law, until barred by foreclosure. 4 Kent's Comm. 153, 154, note *a*, and the authorities there cited. In New York, and perhaps all the American states except one, a judgment at law, against the mortgagor before fore-

closure, is a lien on the equity of redemption, and the estate is liable to be executed and sold, subject to the lien of the mortgagee. But this is not the case as it respects the estate of the mortgagee. The reporter has made Judge SAVAGE say that which is directly [*438] *contradicted by every case in the books which we have seen. The decisions in New York and elsewhere are quite uniform on that important subject. They all say, in express and clear language, that the estate of the mortgagee is not the subject of execution until the title is made absolute by foreclosure. That the default of the mortgagor and forfeiture of the condition of the mortgage, are not sufficient to make the estate of the mortgagee subject to execution. There must first be an absolute foreclosure. 4 Kent's Comm. 154; *Jackson v. Willard*, 4 Johns. Rep. 41; *Blanchard v. Colburn*, 16 Mass. Rep. 345; *Eaton v. Whiting*, 3 Pick. Rep. 484; *Huntington v. Smith*, 4 Conn. Rep. 235; *Bogart v. Perry*, 1 Johns. C. R. 52. The Court can not perceive much analogy, if any, between the great principles which govern mortgaged estates and these now under consideration. In England, not even the equity of redemption is the subject of execution.

Equity can not construe a statute otherwise than a Court of law: both Courts are bound by the same rules of construction. Equity will remove impediments which are in the way of legal rights, and will give redress where there is a right without a remedy at law, or where the legal remedy is incomplete, but can not create a right unknown to the law. *Buford v. Buford*, 1 Bibb, 305; *Allen v. Sanders*, 2 Bibb, 94. A bond for land gives no vested right to the land; it is but a right to ask for land, and may be generally specifically enforced. It is not an equitable interest that the statute can execute and convert into a legal estate. These bonds, bargains, covenants, promises, and agreements for land, remain as they did before the statute, mere choses in action which may com-

pel the subject in specie, or may only sound in damages. They are no more the subject of execution, nor the land therein described, than bonds, covenants, and contracts, for specific chattels. *Thomas v. Marshall*, Hardin's Rep. 19.

There is one other view of the subject which it may be proper to notice. By the statute respecting the assignment and negotiability of bonds and notes, these bonds and covenants for land are made *quasi commercial paper*, and are transferable from hand to hand by endorsement thereon; and each holder can maintain an action against the maker in his own name. It can not therefore be pre-

sumed that, in the eye of the statute respecting [*439] the *execution and sale of trust estates, these

bonds and covenants can be viewed as deeds or conveyances, creating a trust that the statute can execute and convert into a legal estate; and upon which a judgment at law, against each different holder through whose hands they may pass, attaches as a lien. Such a construction would lead to endless difficulties, destroy the object of the statute of assignments, and put out of circulation a large amount of the active and effective capital of the country.

Having thus disposed of the first question, it seems to be unnecessary to examine the second. But as the point was ably argued by the counsel on both sides, and the consideration of it pressed upon the Court with great earnestness, it is due to those concerned that it should be noticed. The complainants' counsel have insisted that the mere inadequacy of price is not sufficient of itself to set aside a contract in any case, and particularly sales at auction. This is certainly correct as a general proposition. There is, however, a great distinction between rescinding a contract when once executed, and refusing to decree a specific performance of a contract. Chancellor KENT says, a Court of equity must be satisfied that the claim is fair, just and reasonable, the contract equal in

all its parts, and founded on an adequate consideration, before it will decree performance. If there be any objection on these points that is well grounded, the party will be left to his remedy at law. *Seymour v. Delancey et al.*, 6 Johns. C. Rep. 222. The Courts in Maryland have said, that to entitle a complainant to a decree for a specific performance, the contract must be neither hard nor unreasonable; but must be fair, full and honest in all its parts, not only in the beginning but that the performance of it must be such that it may be fairly and conscientiously required at the time the aid of the Court is asked. *Carberry v. Tannyhill*, 1 Har. & Johns. 224; *Perkins v. Wright*, 3 Har. & M'Henry, 324. In South Carolina, a specific performance is never decreed, unless the contract be fair, certain, just and equal in all its parts, and for an adequate consideration. *Clitheral v. Ogilvie*, 1 Desaussure, 257. In Kentucky, equity will not enforce the specific execution of a contract, if it were obtained under unfair circumstances, or where there has been any unfair practice after contract, nor unless the contract appears fair and reasonable, nor if it be hard or unconscientious. *Edwards v. Handley*. [*440] *Hardin, 605; *Buckner v. Griffith*, 1 Bibb, 230; *Bowan v. Irons*, 2 Bibb, 78; *Eastland v. Vanarsdel*, 3 Bibb, 274. In England, many of her most able chancellors have repeatedly recognized the same rule of decision. Lords Chancellors SOMERS, MACCLESFIELD, HARCOURT, TALBOT, HARDWICKE, ROSSLYN and ELDON have all said that equity will not carry an unfair or unreasonable transaction into execution, but will leave the party to his remedy at law.

The transaction under consideration is certainly hard and unconscientious. The price paid for the lots is entirely inadequate. It is satisfactorily proved that, at the time of the sale, these lots could have been cashed for at least 105 dollars, and at this time for between 500 and 600 dollars, and the amount paid by the purchasers was only about 21 dollars. The other circumstances of the case

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present the purchasers of these lots in the character of cold, calculating speculators. At the time of the sale and before any purchases were made, Modisett informed them that he had no title to the lots, and that he hoped they would not bid; and after the sale and before any money was paid to the sheriff, Modisett again informed them that he had no title, and that he did not wish them to pay money for him for nothing; and that if they would relinquish their bids he would pay the amount thereof to the sheriff; which proposition they refused to accede to. They were not only willing to see the last drop of blood drawn from their neighbor's veins, but they also now demand the pound of flesh.

Upon the whole view of the case, it is very clear that the appellees are not entitled to the aid of a Court of equity.

Per Curiam.—The decree of the Circuit Court is reversed with costs. To be certified, &c.

Kinney and Dewey, for the appellants.

Farrington and Judah, for the appellees.

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IMPLIED TRUST—If one man buy land with his own money, and take the deed in the name of another, a trust results by implication in favor of him who paid the money.

SAME—PAROL PROOF.—The existence of a resulting trust may be [*441] proved by parol evidence, in opposition to the face of the deed and to the answer of the trustee; but to establish the trust, under those circumstances, the clearest and the strongest testimony must be produced (a).

EQUITY—PLEADING AND PRACTICE—ANSWER.—A bill in chancery, when denied by the answer, must be proved by at least two witnesses, or by one witness and corroborating circumstances, or the complainant can not succeed (b).

PARENT AND CHILD—WAGES OF CHILD.—A father may claim the services of his children, whilst they are under lawful age and are supported by

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him. But should he, at any time, relinquish that claim, the profits of his children's labor then belong to themselves, and can not be seized by the creditors of the father (c).

SAME—SAME—IMPLIED TRUST.—If a son of full age purchase land to be paid for in labor, and his father, being employed for the purpose by the son, perform a part of the work; or if the payment is to be in money, the father lend his son a part of the money with which the payment is made—a trust, *pro tanto*, will not, in either of those cases, result to the father.

RIGHTS OF CREDITORS—PROPERTY SUBJECT TO EXECUTION.—If an execution-defendant have goods subject to the execution, and they be fraudulently placed by a third person out of the reach of the execution, such third person may be compelled by the execution-plaintiff, in a Court of Chancery, to account for the property.

APPEAL from the Marion Circuit Court.

BLACKFORD, J.—This was a bill in chancery, filed by Bartlett Graves and Harvey Gregg against Rufus Jenison, David E. Wade, Samuel Jenison and Stephen Brown. The cause was submitted to the Circuit Court upon bill, answers, and proofs; and that Court rendered a decree against Rufus Jenison, David E. Wade, and Samuel Jenison, as to a part of the complaint against them, and dismissed the bill as to Brown, but without costs. The defendants have appealed to this Court.

It is stated in the bill, that, in 1818, or 1819, Rufus Jenison, one of the defendants, gave his notes to Bartlett Graves, one of the complainants, for the sum of 533 dollars; that, in 1820, he gave to Thomas Buckner, the assignor of Harvey Gregg, the other complainant, his note for the sum of 170 dollars; that, soon after the giving of these notes, Rufus Jenison, the maker, become insolvent; that he was, at the time of his insolvency, possessed of a tract of land in Kentucky on which he resided, but which he had previously mortgaged to David E. Wade, one of the defendants, for the security of a *bona fide* debt; and that, about the time of his becoming insolvent, he sold and conveyed all his interest in this land to

Wade, the mortgagee. The bill states that, in 1823, when Rufus Jenison relinquished all his claim to the land, Wade advanced him 100 dollars, in order that he might afterwards purchase other land in Indiana; that in the spring of 1824, Rufus Jenison, with these 100 [*442] dollars, *came to this state, and purchased a tract of land in Marion county; that, to defraud his creditors, he took the title in the name of Wade; that, soon afterwards, he removed with his family from Kentucky, settled on this land where he made valuable improvements without any contract with Wade, and became possessed of considerable personal property.

The bill states that, in 1825, Rufus Jenison, to defraud his creditors, executed a bill of sale of his personal property to Daniel Pattingall—still keeping possession of the same; that in 1826, when an execution was levied on this personal property, it was fraudulently bought in by Benjamin Atherton with money furnished to him by Rufus Jenison, in whose possession it continued to remain; that Thomas Buckner, afterwards, commenced a suit against Rufus Jenison on the note for 170 dollars, and, in the spring of 1827, whilst this suit was pending against him, the defendant, for the further protection of his property from execution, went to Cincinnati and obtained in the name of his son Samuel, one of the defendants, who had lately become of lawful age, a deed from Wade for the land on which he, Rufus Jenison, and his family resided—his son, the grantee, paying no consideration for the land, and not being present when the deed was executed; and that, upon Rufus Jenison's return from Cincinnati, he fraudulently sold all his personal property to his son Samuel, taking from him a lease for the same property, and for the land conveyed by Wade on which they resided, at the annual rent of 150 dollars.

The bill states that, in October 1827, Thomas Buckner recovered judgment for 187 dollars, and Bartlett Graves recovered judgment for 423 dollars with interest, against

Rufus Jenison, in the Marion Circuit Court; that Graves also, about the same time, recovered judgment against him before a justice of the peace for 164 dollars; that an execution issued on the judgment of the justice in the same month of October, and was levied on a variety of personal property in the possession of Rufus Jenison; that this property was claimed by Samuel Jenison, the right thereto tried by a jury, and, with the exception of a brown mare found to belong to the execution debtor, Rufus Jenison; that the property, the mare excepted, was then sold by virtue of the execution of Samuel Jenison, and the amount of the sale paid over by the constable to Samuel [*443] Jenison, as *landlord of the premises, in part discharge of two quarters' rent alleged to be due him from his father; that the brown mare, found by the jury to belong to Samuel Jenison, and which had been delivered to him by the constable, was in reality the property of Rufus Jenison, and liable to the payment of his debts. The bill states that the judgment obtained by Buckner against Rufus Jenison, is, by assignment, the property of Gregg, one of the complainants; that, in 1828, the complainants, Graves and Gregg, took out executions on their judgments rendered in the Marion Circuit Court against Rufus Jenison; and, there being no goods and chattels, the executions were levied on the real estate on which Rufus Jenison resided, and which had been conveyed to his son by Wade; and that the rents and profits being first offered and not selling, the fee simple in the land was sold by the sheriff to the complainants for the sum of 200 dollars.

The bill further states, that, in the spring of 1826, Samuel Jenison, at the request and as the agent of his father, Rufus Jenison, purchased of George Dolbair a tract of land in Marion county for 125 dollars; that the payment was made with the property, the money, and the labor of Rufus Jenison, whilst Samuel was a minor, living with his father; and that the deed was taken in Samuel's

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name, to evade the payment of the debts due from Rufus Jenison to the complainants. The bill further states that Samuel Jenison has converted to his own use the personal property which he fraudulently bought of and leased to his father; that he has concealed other personal property of Rufus Jenison's from his creditors; and that he has been in the possession, and enjoyed the rents and profits of the land purchased in the name of Wade, since Wade conveyed the same to him. The bill further states that, in November, 1826, Rufus Jenison purchased from the United States, and paid for, two other tracts of land situated in Marion county; but, to defraud his creditors, took the title in the name of Stephen Brown; that these lands are the *bona fide* property of Rufus Jenison, and in his possession; and that Stephen Brown has, since the date of the complainants' judgments, kept concealed in his possession personal property belonging to Rufus Jenison, for the purpose of fraudulently protecting it from the complainants' executions.

[*444] *The prayer of the bill is, 1st, That the land purchased by Rufus Jenison of the United States, in the name of Wade, may be adjudged to have been Rufus Jenison's at the time of the sheriff's sale to the complainants; that that sale by the sheriff may be confirmed, and the complainants put into possession of the land; and that Samuel Jenison may be obliged to account for the rents and profits. 2d, That the land bought by Samuel Jenison of George Dolbair, and that bought by Rufus Jenison of the United States in the name of Stephen Brown, may be adjudged to be the property of Rufus Jenison, and made subject to the judgments of the complainants. 3d, That Samuel Jenison and Stephen Brown may be compelled to account for the personal property of Rufus Jenison, fraudulently protected by them from the complainants' executions.

To this bill of complaint, the defendants have all filed their answers.

The answer of Rufus Jenison is as follows: He admits that he gave the notes to the complainants, and that judgments were obtained upon them, as set out in the bill. He states that he formerly owned a farm in Kentucky, which, in 1816, he mortgaged to David E Wade, one of the defendants, to secure the payment of 1,100 or 1,200 dollars, borrowed money; that, in 1819, he sold the farm to Wade for 600 dollars, besides the mortgage money; that he then leased the farm of Wade for four years at 240 dollars per annum, which was to be re-conveyed to him, should he, at the end of the term, pay Wade 1,700 dollars besides the rent; that, in 1823, being unable to redeem the land, he gave up the possession to Wade, and cancelled the agreement to re-convey, in consideration of Wade's releasing certain rents and other demands due to him. He says that, at the time he was coming to Indiana, he received from Wade 100 dollars, with a request to purchase for Wade 80 acres of land; that he bought the land accordingly, and afterwards came and occupied it with the permission of Wade as a tenant at will; that he had no knowledge at the time he received the money, or at the time he took possession of the land, as to what disposition Wade intended to make of the property. He says that his son, Samuel Jenison, one of the defendants, was 21 years of age on the 25th of September, 1826; that he had certain perquisites arising from the defendant's farm in Kentucky, and that *when he came to this state, the defendant gave him his time, and the privilege of transacting business for himself. He says that, in the spring of 1827, he applied to Wade, at Cincinnati, to ascertain whether he would not sell the land occupied by the defendant to his son Samuel; that Wade refused to sell it to Samuel, but said he would give it to him; and that Wade accordingly executed a deed for the land to Samuel Jenison, and delivered the same to the defendant, who afterwards delivered it to the grantee.

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This defendant, Rufus Jenison, denies that he either purchased, or requested his son Samuel to purchase, any land of George Dolbair. On the contrary, he avers that the purchase was made against his advice and consent; that he furnished no part of the consideration, and has no interest in the property. He denies all knowledge of one of the tracts of land, charged to have been bought by him in the name of Stephen Brown, one of the defendants; but he admits that he did purchase, in Brown's name, the other tract described in the bill. He says, however, that he purchased it merely as the agent of Brown, and paid for it with Brown's money; that he has no interest in it, and never had it in possession. He denies that any of his personal property was ever concealed by Brown, for the purpose of securing it from execution. This defendant admits, that in April, 1827, he leased of his son Samuel the land conveyed by Wade, and also the personal property mentioned in the bill; that Samuel had previously, on the same day, bought this personal property of him; and that it remained in the defendant's possession until it was levied on and sold by virtue of an execution in favor of one of the complainants. He admits, also, that, in 1825, he sold the most of his personal property to Daniel Pattingall; and, at the same time, kept it in his own possession; and that afterwards, when an execution against the defendant in favor of one of the complainants, was levied on this property, Benjamin Atherton, with the defendant's money, at his request, bought it in for him.

The answer of David E. Wade is as follows: This defendant makes the same answer with Rufus Jenison, as to the debt due to him from Jenison, as to the mortgage given to him for its security, and as to his subsequent purchase of Jenison's farm. He says that he would [*446] have rather had a return of the money *lent to Jenison, than a conveyance of the farm; but that it was impossible for Jenison to make payment. He states that he furnished Rufus Jenison 100 dollars to buy for

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him, this defendant, the land mentioned in the bill; that Jenison made the purchase for him as his agent; and that the purchase-money for this land was all paid by him, this defendant, without any contract with Jenison, and without Jenison's paying or agreeing to pay any part of it. He states further, that he intended, at the time of the purchase, to make a present of the land in question to Samuel Jenison; that he has since executed and delivered a deed to him for it; and that neither Rufus Jenison nor Samuel Jenison, ever paid him or contracted to pay him one cent for this land.

The following is the answer of Samuel Jenison: This defendant's statement is the same with Rufus Jenison's respecting his age, his privileges in Kentucky, and his right to receive the profits of his labor and trade for himself, given to him by his father since their removal to this state. He makes a similar statement, also, to that of his father, relative to Wade's execution of a deed to him for the land mentioned in the bill, without his paying any consideration for the same. He says that, in October, 1826, he purchased of George Dolbair the tract of land mentioned in the bill, for the sum of 125 dollars, and has since paid for it with his own labor and funds. He sets out particularly the various items of payment, and, among other things, the payment of 50 dollars by clearing land for Dolbair. He says that he was 21 years of age before he made this purchase; that it was not made at the instance of his father, but in opposition to his advice; and that his father paid no part of the consideration. This defendant admits, that the personal property mentioned in the lease to his father, except a brown mare, was purchased by him of his father on the same day on which the lease is dated; that this property, the mare excepted, was in possession of his father both before and after the purchase and lease; that the same continued in his father's possession until it was levied on and sold by virtue of an execution, in favor of one of the complainants against his

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father; and that the constable paid over the proceeds of the sale to the defendant as landlord of the premises. He says that the *brown mare, alleged in the bill to be his father's, belongs to himself, and was bought by him of John S. Moulton.

The answer of Stephen Brown, as to the purchase of land for him by Rufus Jenison, and as to his concealment of Jenison's goods, is the same with the answer of Rufus Jenison. He denies that Rufus Jenison, or any of his family, ever had any interest, legal or equitable, in the land bought by him for this defendant; and he denies, also, that he ever concealed any of Rufus Jenison's property from his creditors.

After the filing of these answers, the complainants filed an amendment to their bill, which was answered by three of the defendants. It is unnecessary, however, to notice particularly these latter proceedings, as they furnish no additional matter material to the decision of the cause.

The first question which this case presents for our consideration is: Whether the land purchased in the name of Wade, and conveyed by him to Samuel Jenison, is subject to the judgments of the complainants against Rufus Jenison?

The bill admits that the legal title to this land was vested in Wade by a patent from the United States. The complainants contend, however, that the land was paid for with the money of Rufus Jenison; and that, therefore, the beneficial interest and real ownership are in him. The law is admitted that where one man buys land with his own money, and takes the deed in the name of another, a trust results by implication in favor of him who paid the money. *Boyd v. M'Lean*, 1 Johns. C. R. 582. It is only the question of fact, in this case, *as to whose money was paid*, that is in dispute between these parties. The answers of Wade and Rufus Jenison deny the trust, and aver the land to have been bought with the money of Wade. The answer of Wade places the case on very

strong ground against the complainants. It is even said by a respectable writer to be doubtful whether the answer of the trustee denying such a trust, can be contradicted by parol testimony. Sugden on Vendors, p. 415. It is decided in New York, however, that parol evidence is admissible under these circumstances; but the Chancellor says that if the point were *res integra*, he would not admit the evidence. *Boyd v. M'Lean*, 1 Johns. C. R. 582. The claim, in this case, is opposed by the face of the patent, and by the answer of the trustee. [*448] These, we agree, *may be contradicted by parol evidence, but to succeed against them, the clearest and the strongest testimony must be produced.

The defendants' counsel inquired, in the argument, whether Rufus Jenison could have established a trust in this case against Wade, and contended that if he could not his creditors can not. We have looked into the record before us with a view of finding an answer to this question; but our search has been in vain. The complainants say that the purchase-money belonged to Rufus Jenison. Where, we ask, is the evidence of that assertion? The *onus probandi* lies on the complainants. There have been, to be sure, a great number of witnesses examined, but there is not one of them who pretends to any direct knowledge on the subject. The complainants rely entirely on presumptive proof. They show that Rufus Jenison was the actor in delivering the money to the receiver of the land-office; that he settled on the land with his family soon after the purchase; that he made considerable improvements, as if the land were his own. They show that Wade, three years after the purchase, conveyed the land, without consideration, to the son of Rufus Jenison; and that Rufus Jenison, after this, executed a relinquishment of ground for a road through the land. They show, also, several fraudulent attempts of Rufus Jenison, whilst living on the premises, to secure his personal property from his creditors. From these

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circumstances we are called on to presume that Rufus Jenison paid his own money for this land, and that it therefore is his property.

In opposition to this circumstantial proof, Wade relies on his patent from the United States for the land; and also upon his answer, in which he expressly denies the trust, and avers that *he bought the land with his own money*, through the agency of Rufus Jenison.

With this statement of the principal grounds relied on by the parties, we refer again to the question, Could Rufus Jenison, under these circumstances, have established a trust-estate in the premises against Wade? We certainly think not. Even in ordinary cases, where the material allegation of the bill is denied, circumstances like those here relied on would of themselves be of no benefit to the complainant. A bill, when denied, must be proved [*449] by at least two witnesses, or by one witness *and corroborating circumstances. *Smith v. Brush*, 1 Johns. C. R. 459; Stat. 1824, p. 285; *Green et al. v. Vardiman et al.*, Nov. term, 1830. There is not, in the present case, a single witness directly proving the material allegation in the bill; and it is impossible, therefore, that the circumstantial proof relied on could have shaken the legal title of Wade, and the positive denial of the trust contained in his answer. If, then, the testimony be not sufficient to enable Rufus Jenison to establish the trust in question, *a fortiori*, it can not enable the complainants, his creditors, to do so. In deciding the title of Wade to be valid, we put an end to the complainant's claim to the land under consideration. Wade, as the legal and beneficial owner, had a right to make a present of the land to Samuel Jenison, and the latter has a right to hold it, without either of them being accountable to the creditors of Rufus Jenison.

The next question to be examined is, Whether the land purchased by Samuel Jenison from George Dolbair is subject to the judgments against Rufus Jenison?

The charge is, that this land was bought by Samuel Jenison, a minor, for his father, Rufus Jenison; and that the latter paid for it, and is the real owner. This is opposed, 1st, by the deed from Dolbair to Samuel Jenison, in which the purchase-money is stated to have been paid by the grantee; and 2d, by the express denial of these defendants. The answer of Samuel Jenison avers, that he bought the land for himself, after he became of lawful age, in opposition to his father's advice; and that he paid for it with his own labor and funds. The complainants produce no evidence that can, in the slightest degree, affect this defence. They principally rely upon some work, done by two of Rufus Jenison's minor sons, in aid of Samuel Jenison, whilst he was clearing land for Dolbair, in part payment for the land previously purchased. These young men who thus assisted their brother, it is proved, had the permission of their father to work and trade for themselves; and they were employed by their brother Samuel to assist him in the performance of this work, and were paid for their labor by him. No title, surely, can be claimed for Rufus Jenison to any part of this land, on the ground of his having paid a part of the consideration by this labor of his minor sons.

The father, it is true, may claim the services of [*450] his children, *whilst they are under lawful age, and are supported by him. 1 Bl. Comm. 453. But, we conceive, he may relinquish that claim at any time, and when he does, the profits of his children's labor belong to themselves. The property acquired by a minor son, in such a case, is as much his own, as if it were a legacy bequeathed to him; and it can not be seized by the creditors of the father. Besides, these young men were employed by their brother, Samuel Jenison, and performed the labor for him; and even if the father were entitled to the profits of their work, still he could have no claim for the same but on the person who had employed them. It would have been the same case had

Rufus Jenison himself been hired by his son Samuel to do this work, in part payment for the land; or had he even, *bona fide*, lent Samuel a sum of money to assist him in the payment. In neither of these cases would the father be considered as paying part of the purchase-money, from which a trust *pro tanto* could result to him. His claim would be alone on his son for the work done or the money lent.

We conclude, therefore, that the complainants have no claim on the land purchased of Dolbair by Samuel Jenison.

The third question in this cause is, Have the complainants any claim on the land bought in the name of Stephen Brown?

There are two tracts of land charged in the bill to have been purchased by Rufus Jenison with his own money, and the titles to have been fraudulently taken by him in the name of Brown. This charge is denied by the answers of these defendants, Rufus Jenison and Brown. Of one of the tracts of land they have no knowledge. The other was bought for Brown, according to the answers, in the name and with the money of Brown, by his agent, Rufus Jenison. To avoid the statement in the answers, viz., that Brown furnished the purchase-money, the complainants say, the money was lent by him to Rufus Jenison, and has been repaid to him by the labor, for a year, of one of the minor sons of Rufus Jenison. The only proof on this subject is, that soon after the purchase, Rufus Jenison, Junior, a minor son of Rufus Jenison, did work a year for Brown. But it is also in evidence, that this labor was for the young man's own benefit, he having, at the time, a general permission from his father to work for himself. The contract between young Jenison and Brown was, that the former should receive [*451] *from the latter 100 dollars for the year's work, to be paid in land or money. Brown, afterwards, paid the young man in money for the work he had done, who gave about one-half of the amount to his father,

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Rufus Jenison, and expended the other half for clothes and other necessities for himself. This transaction is, therefore, very satisfactorily explained; and the inference which the complainants would draw from it, viz., that the money was Rufus Jenison's which paid for the land bought in Brown's name, has no foundation in the facts of the case.

We come now to the last point in this tedious cause. The bill charges Samuel Jenison and Stephen Brown, with concealing, or converting to their own use, the personal property of Rufus Jenison, for the purpose of defrauding his creditors. There is no doubt, that if these defendants have fraudulently placed any of the goods of Rufus Jenison out of the reach of the complainants' executions, they may be compelled to account for the property in a Court of chancery. *Hendricks v. Robinson*, 2 Johns. C. R. 283, 296. This part of the bill, however, like the other parts of it already noticed, is not sustained by the evidence. The charge is denied, in their answers, by these defendants, Brown and Samuel Jenison. There is no evidence whatever, on this subject, against Brown. It appears, with respect to Samuel Jenison, that, about the time he became of age, he bought a mare of Moulton, which he kept on the farm occupied by his father. An execution in favor of one of the complainants was levied on this mare, but, on a trial of the right of property, she was adjudged to be Samuel Jenison's. The answer also of Samuel Jenison, avers the mare to be his own, and to have been paid for by himself; and there is no proof to the contrary. It further appears that Samuel Jenison did, at one time, buy the personal property belonging to his father, and then lease it to him, with the fraudulent intent of placing the same beyond the reach of executions against his father. The scheme, however, did not succeed. The property was afterwards levied on and sold, by virtue of an execution in favor of one of the complainants against Rufus Jenison. The contemplated fraud, therefore, failed

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in its purpose ; and, of course, the complainants sustained no injury by it. It is true, the proceeds of this sale [*452] appear to have been afterwards paid over by *the officer to Samuel Jenison, for rent due to him as landlord of the premises on which the debtor lived. But as to that, no fraud was proved. Samuel Jenison was, as has been already shown, the *bona fide* owner of the farm on which his father lived, and had a right to claim the proceeds of the execution sale, in payment of the rent due to him.

There is clear proof of fraudulent purchases of Rufus Jenison's personal property by Pattengall and Atherton, as charged in the bill ; but it is not shown that these fraudulent transactions benefited any of the defendants, or injured either of the complainants. The property, after these purchases, continued, as before, in Rufus Jenison's possession ; and was subsequently sold, on an execution against him, issued by one of the complainants.

We have now gone through the whole of this cause, and are satisfied that neither the land purchased for Wade by Rufus Jenison—nor the land purchased for himself by Samuel Jenison—nor the land purchased for Brown by Rufus Jenison—is subject to the judgments of the complainants against Rufus Jenison. We are also satisfied, that no personal property has been fraudulently protected from the complainants' executions against Rufus Jenison, either by Samuel Jenison or by Brown. The opinion of this Court, therefore, is—that the complainants have no foundation for their bill ; and that the same should have been dismissed by the Circuit Court, at the costs of the complainants.

Per Curiam.—The decree is reversed with costs. Cause remanded to the Circuit Court, with directions to dismiss the bill, &c.

Brown, Morrison and Caswell, for the appellants.

Fletcher and Gregg, for the appellees.

Doe, on the Demise of Brown and Others, v. Owen.

DOE, on the Demise of BROWN and Others, v. OWEN.

EJECTMENT—PLAINTIFF—COSTS—PRACTICE.—If, in ejectment, there be a verdict and judgment for the defendant, the judgment for costs must be entered against the nominal plaintiff, and not against the lessor.

SAME—AMENDMENT OF TRANSCRIPT.—But a judgment in such case, against the lessor, being defective only in form, may be amended on motion [*453] in the Court below. Even after the cause is removed by writ of error, the proceedings in the Supreme Court will be stayed, on motion, till the amendment can be made; and, after the amendment, a new transcript may be obtained, on suggestion of diminution, and the judgment affirmed (a).

ERROR to the Posey Circuit Court.

STEVENS, J.—This was an action of trespass and ejectment, brought by the plaintiff in error against the defendant in error, to recover the possession of certain lands set forth and described in the declaration. The parties entered into the common consent rule, and an issue was joined on the plea of not guilty. A jury trial was had, and a correct and regular verdict found in favor of the defendant; on which the Court rendered judgment in favor of the defendant, that he should recover of the lessors of the plaintiff his costs, &c. To reverse this verdict and judgment this writ of error is prosecuted.

Several errors are relied on by the plaintiff, but we think none are well taken except the last one, which is, that the judgment should have been against the nominal plaintiff, and not against the lessors of the plaintiff. This error is well taken; the judgment should have been against the nominal plaintiff and not against the lessors (1). This being mere matter of form, the defendant might have had it amended, on motion, in the Court below, even after the transcript was transmitted to this Court. And the amendment being in the form of the judgment only, this Court would have stayed the proceedings, on motion, until the amendment could have

(a) 40 Ind. 263; 41 *Id.* 543.

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been made in the Court below; a diminution could then have been alleged, and a transcript of the amended record brought up on certiorari, and a reversal of the judgment have thus been prevented (2). The defendant has not thought proper to take that course, and we must act upon the record as it stands.

Per Curiam.—The judgment, as to the lessors, is reversed. Cause remanded, &c.

Crawford and Hall, for the plaintiff.

Judah and Battell, for the defendant.

(1) The law is now otherwise. By a late statute, the defendant in ejectment, if the judgment be in his favor, may take a judgment for costs against the lessor of the plaintiff. Stat. 1833, p. 113. Vide note to *Eaton v. Benefield*, ante, p. 54.

(2) Vide note to *Songer, Adm'r. v. Walker et al.*, vol. 1, of these Rep. 251.

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*SCOTT v. MORTSINGER.

MALICIOUS PROSECUTION—PERJURY—EVIDENCE.—Case by A. against B. Counts in malicious prosecution for perjury, and in slander for words charging the same crime. Plea, that A. had committed the perjury alleged. *Held*, that B. might prove, on trial, that A. had given advice as to the best mode of commencing the suit against B. in support of which A. was said to have afterwards committed perjury; and might also prove that A. had received information, before he gave his evidence, tending to show the want of any foundation to the suit against B.

SAME—DEFENCE—PROBABLE CAUSE.—*Held*, also, that the defendant, under the plea, in this case, might show that there was a probable cause for his prosecution against the plaintiff.

PERJURY—WHAT.—If a witness, with an intention to deceive the jury, swear so as to make an impression on their minds that a fact material in the cause is different from what it really is, and from what he knows it to be, he is guilty of perjury.

PRESUMPTION—ACTION OF COURT.—If, after the examination of a witness is closed, his re-examination be asked for and refused, this Court will presume such refusal to be correct, unless the records show that there was a good cause for the re-examination.

SLANDER—MALICE—EVIDENCE.—The plaintiff, in the above-mentioned cause, in order to show malice in the defendant, had a right to prove

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that the slanderous words, charged in the declaration, had been spoken after, as well as before, the commencement of the suit.

ERROR to the Washington Circuit Court.

M'KINNEY, J.—Trespass on the case. The declaration contains four counts: two charging a malicious prosecution, and two in slander. The counts for a malicious prosecution are founded upon the plaintiff's arrest and acquittal on a charge of perjury, said to have been committed on the trial of a cause before a justice of the peace, in which Jacob Laughhehour was plaintiff, and the defendant, John Humphrey, Albert Lamb and John Trowbridge, were defendants; those in slander, on a charge of perjury. A special plea of justification was filed to the whole declaration, and a verdict and judgment were rendered for the defendant. A motion for a new trial was overruled, and two several bills of exceptions were taken to the opinion of the Court.

The plaintiff in error assigns several reasons for reversing the judgment.

1. "The Court erred in permitting, for the purpose of proving malice, in the plaintiff toward the defendant, several witnesses to state that the plaintiff had advised Laughhehour to sue the defendant, Lamb, Humphrey and Trowbridge, all in one suit for the purpose of preventing one being a witness for the other. The plaintiff [*455] contends that this was *dehors* *the issue and inadmissible. The plea charged the plaintiff with perjury. Collateral facts are admissible to prove intention, malice, or guilty knowledge. Where the intention does not appear from the transaction itself, it must be inferred from other facts and circumstances. Evidence of the mind and intention is afforded by the general conduct. 2 Stark. on Ev. 378, 382. Corrupt intention is one of the constituents of the crime of perjury. In the admission of this evidence it does not appear that the Court erred.

2. "The Court permitted Humphrey, who was one of the defendants in the suit before the justice of the peace,

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to prove that he and the defendant, Mortsinger, told the plaintiff when he came to look at the tree, and the situation of the heifer under it, that the heifer was not there when the tree was felled." The action before the justice of the peace was brought to recover damages for the value of a heifer, charged to have been killed by the defendants. Upon an indictment against the plaintiff for the offence charged in the plea, Humphrey would be a competent witness. To sustain such indictment, it would be necessary to establish the corrupt intention. Circumstances showing it would be admissible. We think the evidence was for the jury.

3. It is assigned for error, that the Court refused to instruct the jury "that the question of probable cause—that is, whether Mortsinger, the defendant, had any probable cause to prosecute Scott, the plaintiff, for perjury—does not arise in the present case, and the jury have nothing to do with it, inasmuch as the defendant had pleaded justification to the whole declaration." The plaintiff has relied, with much confidence, upon the refusal of the Court to give this instruction. We will examine the principle for which he contends. Malice, and the want of probable cause, must both be established in an action for malicious prosecution. *White v. Dingley*, 4 Mass. Rep. 433; *Lindsay v. Larned*, 17 ib. 190. This is said to result as well from public convenience as from policy. Offenders would not be prosecuted if acquittal was attended with danger. A well-founded suspicion of guilt in the prosecution of an offender, is a protection against damages. A prosecutor is protected by the law, however malicious his private motives may have been, provided he had

[*456] probable cause. 2 Stark on Ev. 910. *Under the general issue, a defendant may justify the proceedings had against the plaintiff, and show that he had probable cause. 2 Phillips on Ev. 115. When he meets the case by a special plea of justification, affirming the plaintiff to be guilty of the crime for which he was prosecuted,

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the burthen of proof devolves upon him. A failure, however, to sustain the plea, and the want of probable cause, present separate and distinct questions. The first relates to the pending action, and the latter to the grounds of the prosecution. As the defendant, under the general issue, could justify the proceedings and show that he had probable cause, it would seem that it could also be done under a special plea. The position the plaintiff has assumed is certainly too broad. The jury to whom such a case is submitted, in giving it consideration, must have their attention fixed upon the character of the charge. If, upon such consideration, it should appear there was probable cause, it would be their duty to find for the defendant. We think the case of *Sterling v. Adams* and others, 5 Day, 411, sustains the Court below, in refusing to give the instructions.

The 4th error is directed to the following instructions given to the jury. 1. "That if the jury believe that the plaintiff swore on the trial set out in the plea, so as to make an impression on the jury different from what the facts in the case really were and he knew them to exist differently from what he represented them to the jury, and intentionally intended to deceive the jury in giving his testimony in the matter set out in the plea of the defendant, he is guilty of perjury. 2. That if the plaintiff kept back anything which was known to him in the matter set forth in the plea, and swore so as to make a different impression from what the facts, as known to him, would have made if disclosed, and he did so, or swore in a manner above knowingly, it is perjury." These instructions, taken together, amount to the proposition, that if the plaintiff, on the trial before the justice of the peace, swore falsely in fact and corruptly and wickedly against his better knowledge, he was guilty of perjury. The instructions, although not concise, constitute the definition of the crime. The Court does not appear to have applied any part of the testimony to the specific

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charge in the plea. If testimony had been introduced inapplicable to the issue, its exclusion would not have been in conflict with the instructions thus given.

[*457] *Error is also said to have intervened by the Court's refusal to permit a witness to be called back for re-examination who had retired. The record does not show the points on which it was wished that the witness should be re-examined. We are therefore unable to say whether the testimony was material or not. In the absence of the ground upon which it acted, we presume that the Circuit Court acted agreeably to a sound and correct view of the case. There must be some limitation to the examination of a witness. After the examination and dismissal of a witness, occasions may occur which would justify a re-examination. The case of *Curren v. Connery*, reported in 5 Binney, 488, presents such an one. The record, in that case, disclosed the point to which the re-examination was directed. It was material to the issue.

The last error assigned is the rejection of evidence that the defendant, both before and since the institution of the action, had spoken of the plaintiff the same slanderous words laid in the declaration. It is settled that to show the malicious motive of the defendant, a plaintiff may give in evidence words that are actionable, though not specified in the declaration, and although they were spoken subsequently to the words declared upon. 2 Stark. on Ev. 869. The plaintiff wished to prove the speaking of the words declared upon, both before and after the institution of the suit. We think this should have been permitted. Under the general issue this testimony would have been legal. It is not excluded by the special plea. For this error the judgment must be reversed.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

Farnham, for the plaintiff.

Hawk, for the defendant.

 Morris and Another v. Price.

MORRIS and Another v. PRICE.

ATTACHMENT-BOND—BREACH—PLEADING.—A declaration in debt on an attachment-bond, after setting out the bond and condition, avered that the attachment had been sued out, brought to issue, tried, and adjudged to be void, without cause, tortious, and oppressive; and that the plaintiff had been much oppressed, and put to great trouble and expense, in defending himself against said false, feigned, and vexatious proceedings [*458] of the defendant. *Held*, on *special demurrer, that the determination of the attachment-suit, the damages sustained, and the want of cause for the attachment, were set out with sufficient certainty.

SAME—DAMAGE—ATTORNEY'S FEE.—*Held*, also, that on the assessment of damages, the demurrer being overruled, evidence of the plaintiff's having paid a fee to an attorney, in the attachment-suit was admissible (a).

PRACTICE—DEMURRER—JUDGMENT.—*Held*, also, that on overruling the demurrer in such case, final judgment should be stayed until the truth of the breaches assigned are inquired into and the damages assessed; and that, after such assessment, final judgment should be rendered for the debt in the declaration mentioned with costs, and execution awarded for the damages assessed with costs (b).

APPEAL from the Rush Circuit Court.

STEVENS, J.—This was an action of debt in the Rush Circuit Court, brought by the appellee against the appellants, on a penal bond conditioned that the said Levi Morris should well, truly, and *bona fide*, prosecute a certain writ of attachment, which he was about suing out of the Rush Circuit Court against the goods, chattels, lands, tenements, credits, moneys, and effects of the appellee, and pay to him all damages which he might sustain in consequence of said proceedings on attachment, should the same be adjudged tortious or oppressive. The declaration sets out the bond and condition, and avers that the writ of attachment was sued out, brought to issue, and tried in the Rush Circuit Court, and adjudged to be void, without cause, tortious, and oppressive, and that the plaintiff was much oppressed, put to great costs, trouble, and expense, in defending himself against said false, feigned and vexatious proceedings on attachment of said

 (a) 43 Ind. 486. (b) *Supra*, 359; 6 Ind. 387.

Levi. To this declaration the defendants demurred, and set down as causes of demurrer: "1st, There is no averment in the declaration that the proceedings on attachment are finally ended; 2d, There is no special averment of any damages having been sustained, above the costs which defendants would be bound by the judgment at law to pay; 3d, There is no averment that the proceedings on attachment were without just and probable cause." The demurrer was overruled and judgment given for the plaintiff, a writ of inquiry awarded, and damages assessed.

By a bill of exceptions it appears of record that, after the jury was sworn to assess the damages, the plaintiff offered to prove that he had paid an attorney 10 dollars to defend him against said writ of attachment; to the introduction of which evidence the defendants objected, [*459] but the Court overruled the objection, and the evidence went to the jury. The errors complained of are: 1st, The overruling the demurrer; 2d, The permitting the evidence set out in the bill of exceptions to go to the jury; and 3d, The rendition of the judgment in manner and form as it is rendered.

The whole of the proceedings in this case are somewhat loose, informal and irregular, but are all substantially good, except the rendition of the judgment. On overruling the demurrer, the order of the Court should have been that the plaintiff should recover his debt and damages on the occasion of the detention thereof; but that judgment should not be given until the truth of the breaches assigned were inquired into and the damages assessed. After that, final judgment should have been rendered for the plaintiff for the debt in the declaration mentioned with costs, and execution awarded for the damages assessed with costs. 1 Saunders, 58 and note 1; 3 Chitt. Pl. 280, 287; *Clark v. Goodwin*, July term, 1820; *Glidewell et al. v. M'Gaughey*, November term, 1830; 1 Blackf. Rep. Appendix, 437.

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M'KINNEY, J., having been of counsel in the cause, was absent.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Smith, for the appellants.

Wick, for the appellee.

JOHNSON, Surviving Administrator, v. HAWKINS.

JUDGMENT—EXCESSIVE—AGAINST ADMINISTRATOR—PRACTICE.—Debt by A. against B. administrator of C., on a bond of the intestate for 860 dollars. Damage, 100 dollars. Pleas, *non est factum* and *plene administravit*. Verdict for the debt, and for 481 dollars and 60 cents damages; in all, 1,341 dollars and 60 cents. Judgment for the same, *de bonis propriis*, with costs.

Held, that the judgment is erroneous: 1st, because it is *de bonis propriis*; and, 2dly, because it is for a greater sum than is laid in the declaration. *Held*, also, that the jury should have not only found the amount of the debt and damages, but also the amount of assets in the defendant's hands.

ERROR to the Martin Circuit Court.

STEVENS, J.—Debt by James Hawkins against Julius Johnson, Charles Brown and Timothy Moses, administrators of the *estate of Benjamin Vanator, deceased, on a writing obligatory made by the deceased in his life time, for the payment of the sum of 860 dollars to the plaintiff. The damages laid in the declaration for the detention of the debt are 100 dollars. The defendants pleaded two pleas: first, that the supposed writing obligatory was not the deed of the deceased; and, secondly, *plene administravit*. Issue was joined on the first plea. To the second plea, a replication denying the plea and averring that there were assets to the amount of 1,000 dollars was filed and issue joined thereon. The verdict was as follows: "We of the jury find for the plaintiff the debt in the declaration mentioned, and assess his damage at 481 dollars and 60 cents, making in the

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whole the sum of 1,341 dollars and 60 cents." A motion for a new trial was made and overruled, and the following judgment rendered: "It is therefore considered by the Court that the plaintiff recover of the defendants the sum of 860 dollars, the debt, and 481 dollars and 60 cents damages, making in the whole the sum of 1,341 dollars and 60 cents, as by the jurors aforesaid in manner and form aforesaid assessed, and that he recover his costs."

The judgment in this case, being *de bonis propriis*, is erroneous. Neither of the pleas can be considered false within the defendant's knowledge. However, if this was the only error, time might be given for the Court below to amend that error. *Short v. Coffin*, 5 Burr. 2730; *King, adm'r, v. Anthony, adm'r*, May term, 1828. The verdict is also erroneous, being for a greater sum in damages than is laid in the declaration. The Court below ought to have set it aside, and granted a *renire de novo*, unless the plaintiff would have remitted the excess of the damages. And this Court, if asked, might give time for the *remittitur* to be moved and entered in the Court below, if there were no other errors. 1 Sellon's Practice, 481; *Hoits v. Molony*, 2 N. Hamp. Rep. 322; *Harris v. Jaffray*, 3 Har. & John. 546; *Bank of Kentucky v. Ashley et al.*, 2 Peters, 329; Cro. Jac. 146; Hob. 178; Barnes, 17; 3 D. & E. 349, 659, 749, &c. The verdict is also further erroneous. On the issues of *non est factum* and *plene administravit*, the jury finding both issues for the plaintiff should have not only found the debt in the declaration, and assessed the damages for the detention thereof, but should have also found the amount of the assets in [*461] *the hands of the administrators, they being liable no further than for the amount in their hands. *Fairfax's executor v. Fairfax*, 5 Cranch, 19; *Siglar, adm'r, v. Haywood*, 8 Wheat. 675; *King, adm'r, v. Anthony, adm'r*, May term, 1828. Vide, also, statutes of the state of Indiana.

Sims and Others v. Givan.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Kinney, for the plaintiff.

Judah, for the defendant.

SIMS and Others v. GIVAN.

WITNESS—INTEREST—COMPETENCY.—No confession of interest made by a witness, after a party is entitled to his testimony, can render him incompetent.

SAME.—To exclude a witness on the ground of interest, he must appear to be interested in favor of the party who calls him.

EVIDENCE—QUESTION AS TO SUFFICIENCY.—If the defendant believes the plaintiff's evidence to be insufficient to sustain the action, he should obtain the decision of the Circuit Court on the subject, by asking instructions to the jury, by a motion for a new trial, or in some other way. Without some such previous proceeding, though the evidence be set out in a bill of exceptions, the Supreme Court can take no notice of the question.

WITNESS—INCOMPETENCY—PRACTICE.—If, in the course of a witness's examination, he appears from his own answers to be incompetent, the party against whom the evidence is given, should move to strike out the testimony. But, if no objection be made below to the evidence, its admission can not be assigned for error.

ERROR to the Hendricks Circuit Court.

BLACKFORD, J.—This was an action on the case by Givan against Sims and others. The cause of action declared on is, that Givan was the owner of a boat and a cargo of salt; that in an attempt to ascend White River, between Spencer and Indianapolis, this property was lost; and that the loss was occasioned by a dam obstructing the navigation of the river, which the defendants had wrongfully erected. To this action, the defendants pleaded not guilty. On the trial of the cause, the defendants objected to one of the plaintiff's witnesses, by the name of Jones, as being interested, and undertook to prove his interest by other witnesses. The whole object of the proof was, to show that Jones himself was the owner of the property lost.

This testimony was rejected by the Circuit Court; [*462] and *the plaintiff was permitted to examine the witness. The evidence of Jones is set out in the record, and is said to be all the testimony given by the plaintiff, relative to his property in the boat and salt. The jury acquitted one of the defendants, and found a verdict of guilty against the others. A judgment was rendered by the Court, in conformity with the verdict.

To reverse this judgment, it is contended, first, that the evidence rejected was sufficient to prove Jones to be interested; secondly, that the plaintiff's evidence did not show his ownership of the property lost; thirdly, that the testimony of Jones himself shows him to be interested.

The first objection to the judgment is not sustainable. A part of the evidence offered to prove the witness's interest, consisted of declarations made by him after the cause of action arose. These declarations were of no consequence. No confession of interest made by a witness, after a party is entitled to his testimony, can render him incompetent. *Pollock v. Gillespie*, 2 Yeates, 129. Independently, however, of this consideration, applicable only to a part of the proof offered, there is a valid objection which applies to it all. To exclude a witness on the ground of interest, he must appear to be interested in favor of the party who calls him. *Peake's Ev.* 160. The defendants only propose to prove that the property lost belonged to the witness. That evidence was not sufficient to exclude him. If the property belonged to the witness, it is not to be presumed that he would wish to see the compensation for its loss go into the pocket of the plaintiff. His feelings would more probably be the other way. He might therefore not be a competent witness, if called by the defendants; and yet, at the same time, be the best the plaintiff could produce.

In the case of an indorsee against the acceptor of a bill, the defendant called the indorser to prove that the bill belonged to the indorser himself, and not to the plaintiff.

The witness was adjudged to be interested to defeat the action, and was accordingly rejected. *Buckland v. Tankard*, 5 T. R. 578. This authority proves, that, had the witness in the case before us been called by the defendants, the plaintiff might have objected, that as the witness claimed the property lost, he was interested in defeating the action. But this reason for the witness's incompetency, when called by the defendants, shows that they [*463] *could not object to him as the plaintiff's witness—his interest being in their favor and against the party calling him. The legatee in a will, for example, is not a competent witness at common law to support the will, because it is his interest to support it; but he is a good witness to disprove the will, for he then swears against his interest. *Ocenden v. Penderic*, 2 Salk. 691. In a suit against a sheriff for the misconduct of his bailiff, the latter is an incompetent witness for the defendant, it being his interest to defeat an action the success of which makes him liable to his principal. But the bailiff is an unobjectionable witness in such a case, when called by the plaintiff, because his interest is against the action. Arch. Plead. 439. These authorities show that the defendants' objection to the witness is without foundation. The witness's interest, arising from his claim to the property lost, is against the action, and can be no objection to him, when called by the plaintiff.

There was no proof offered that Jones was to have any part of the damages which might be recovered; or that he was to be liable to the plaintiff if the action failed; or that he had any other interest in the plaintiff's success. The objection made to his competency was, therefore, correctly overruled. The most of the evidence offered to prove the incompetency of Jones as a witness, and properly rejected as inadmissible for that purpose, was legal testimony for the defendants on the trial of the merits. If they could prove that the property belonged to Jones, and not to the plaintiff, they would defeat the plaintiff's

action, by showing he had no right to recover. In that way alone they were entitled to the admission of the evidence referred to; and it does not appear that that right was denied them.

The next objection to the judgment is, that there was not sufficient proof that the property lost belonged to the plaintiff. The evidence given on this point is set out in the record by a bill of exceptions; but no opinion of the Circuit Court, with respect to its sufficiency, appears to have been expressed or asked for. The defendants, if they believed the evidence insufficient to sustain the action, should have obtained a decision of the Circuit Court on the question, by asking instructions to the jury, or by a motion for a new trial, or in some other mode.

[*464] *Without some such previous proceeding, it is impossible for this Court to take any notice of the subject.

The last objection to the judgment is, that an incompetent witness was examined, as appears by his own evidence on the record. The practice in these cases is, that if, in the course of the witness's examination, he appears from his own answers to be incompetent, the opposite party moves to strike out his testimony. There was no motion of this kind made in the Circuit Court by the defendants; but they have chosen to submit the objection, in the first instance, to the consideration of this Court. We have no authority, under those circumstances, to examine the question.

The judgment in favor of the plaintiff below must be affirmed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Fletcher and Gregg, for the plaintiffs.

Wick, for the defendant.

Lurton v. Carson.

LURTON v. CARSON.

EVIDENCE—SUFFICIENCY—RECORD—BILL OF EXCEPTIONS.—If a motion for new trial, made on the ground that the verdict is unsupported by the evidence, be overruled, and the opinion be excepted to,—the bill of exceptions must show that it contains all the evidence given in the cause (a).
SAME—WEIGHT OF.—If the evidence be contradictory, and there be ground for an honest difference of opinion as to the propriety of the verdict, the refusal to grant a new trial is not error (b).

ERROR to the Posey Circuit Court.

M'KINNEY, J.—Action of trespass and false imprisonment. Verdict and judgment for the plaintiff.

A bill of exceptions was taken to the opinion of the Court, overruling a motion for a new trial. The bill contains the testimony of several witnesses, but does not show that it presents all the testimony given on the trial. This is necessary. If it does not appear, we will, agreeably to the case of *Reno v. Crane*, May term, 1829, of this Court, presume that the Circuit Court acted correctly. To enable us to say whether the Court below was correct in its refusal to grant a new trial, it is obvious that we should be in possession of all the testimony in the case.

[*465] *The testimony presented is contradictory. Exclusive of the defect in the bill of exceptions, we should be unwilling to interfere with this verdict. The verdict of a jury is entitled to great respect. It is their province, in such a case as this, to weigh the testimony. It is with reluctance that a Court would interfere. If there be ground for an honest difference of opinion, the verdict should not be set aside.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

Battell and Hall, for the plaintiff.

Judah, for the defendant.

(a) 8 Ind. 24; 4 Id. 266. (b) 37 Ind. 361.

Picquet v. M'Kay.

PICQUET v. M'KAY.

TROVER—PLAINTIFF'S TITLE.—To support the action of trover, the plaintiff must prove property, and the right of possession in himself, and a conversion by the defendant.

SAME—LIEN OF DEFENDANT.—If the defendant has a lien on the goods for which trover is brought against him, the action cannot be sustained, unless a tender have been made to the defendant of the amount of the claim.

SAME—WAIVER OF LIEN.—If a person have a lien on goods for the price of hauling them to a place of deposit, his subsequently claiming them as his own, and refusing, on that ground, to deliver them to the owner, is a waiver of the lien.

LIEN—BAILEE—CHARACTER OF.—If A. deposit with B. a quantity of grain for safe-keeping, and, at the time of making the deposit borrow money and buy goods on credit of B.—the law creates no lien for the debt on the grain, in the absence of any agreement to that effect.

NEW TRIAL—EXCESSIVE DAMAGES.—A new trial should not be granted in an action on tort, on the ground that the damages are excessive, unless they appear at first blush to be outrageous and excessive (a).

FORMER RECOVERY—PLEADING.—To render a former recovery an estoppel to a subsequent suit, embracing the same matter in controversy with the first, the judgment must be specially pleaded as an estoppel. If it be not so pleaded, and the defendant rely on the general issue, the former judgment is admissible in evidence, but it is not a conclusive bar to the action: the jury may still find for the plaintiff, if they think him entitled to recover.

ERROR to the Jefferson Circuit Court.—M'Kay was the plaintiff below, and Picquet the defendant.

M'KINNEY, J.—This was an action of trover brought to recover the value of 248½ barrels of corn. Plea, not guilty. Verdict for the plaintiff below for 220 dollars, and judgment. A motion for a new trial founded upon the following reasons: 1st. The verdict is contrary to law and evidence: 2d. The damages are excessive; 3d, The record offered in evidence by defendant was conclusive [*466] between the parties, and the verdict *ought to have been for the defendant,—was overruled, and a bill of exceptions taken to the opinion of the Court. Two errors are assigned: the refusal of the Court to

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grant a new trial, and the rendition of judgment upon the verdict.

The testimony shows that, about the last of December, 1828, M'Kay had, at a landing on the Ohio river, 248½ barrels of corn; that it was hauled by Picquet's teams to his cribs, and the parties agreed that if it did not spoil, having been under water five or six hours, Picquet was to keep it at one dollar per barrel, and if it did spoil, M'Kay was to take it away, paying Picquet the expense of hauling it from the landing to the cribs, amounting to 17 dollars. After the deposit of the corn, M'Kay received from Picquet 60 dollars in cash and 15 dollars in goods. The terms upon which the money was paid did not appear. On the 20th of February following, M'Kay demanded the corn. Picquet refused to deliver it, saying it was his, and on being asked for the price of it, remarked that he would pay for it when he pleased. It appears that Picquet stated that he did not advance the money on account of the corn, but that a note was taken payable to C. M. Martin & Co., merchants of Madison, for the money, and by them endorsed to him; that good corn was worth at the time of the demand one dollar and 25 cents per barrel; that after the demand was made, Picquet offered to let M'Kay have the corn, on his paying the amount of money and goods advanced and the expense of hauling, or to give him 62½ cents per barrel for it; that the corn was noticed on the day of the demand—a part was frozen and the balance wet and damaged and daily becoming worse; that neither the money advanced nor the expense of hauling, had been tendered; that an authenticated copy of a record of a chancery cause, brought by Picquet against M'Kay in the Gallatin Circuit Court, Kentucky, was admitted in evidence by the Court, and read to the jury; that the corn, the subject of the suit in Kentucky, was the same for which this action was brought; that the chancery suit in Kentucky was brought after the institution of this action; and that a

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part of the corn was sold in May, 1829, at 75 cents per barrel, and that one other crib was as good as that which was thus sold.

To sustain this action it is essential that the plaintiff prove property and the right of possession in himself, and a *conversion by the defendant. The property in the corn does not appear to be controverted. It is in M'Kay. Picquet treated it as such, by the proceeding he instituted in Kentucky. But it is said that Picquet had a lien which well justified the refusal to deliver, until the lien was tendered or discharged. If this be correct, Picquet was not guilty of the conversion. We will examine this position. Liens are of three kinds: by common law, by express agreement, or by usage. Picquet was not a common carrier, he therefore has no lien at common law. His lien to the amount of hauling the corn to the cribs, could only attach by express agreement; no usage being alleged, and none existing. Assuming that the agreement that Picquet should have the corn at one dollar per barrel if it did not spoil, and if it did that M'Kay was to take it away on paying the expense of hauling, created a lien to that extent; yet, it is conceived that on the demand being made, the lien was waived by Picquet's claiming the corn as his own. The relation in which they stood by the agreement was changed by this claim. It was not the assertion of a right to the amount of an existing lien, but to the property itself. A lien can not be waived and resumed at pleasure. If a different ground of retention than of the lien be assumed, the lien ceases to exist. *Boardman v. Sill*, 1 Campb. N. P. Cas. 410. If the lien does not exist by virtue of the hauling, is it created by the advance of money and goods? This idea is repelled by the express declaration of Picquet, that he did not make the advance of money and goods on account of the corn, but that for the money he had taken M'Kay's note to C. M. Martin & Co., and that it was endorsed to him by them. This note was payable

one day after date, and assuredly establishes a preference to personal liability, rather than to the corn. Had no such declaration, however, been made, and the fact of the money and goods advanced been admitted, yet, in the absence of an agreement that a lien should exist, the law would not have created it. This conclusion, exclusive of the declaration of Picquet, is fully sustained by the case of *Levering v. Bond's Adm'r*, 2 Harr. & J. R. 300.

It is also alleged that the damages are excessive. New trials should be granted, when the finding of a jury has stamped upon it a palpable disregard of the rights of a party, and the indulgence of a prejudiced rather [*468] than a just view of the case. *A verdict, however, to justify the intervention of a Court, should, in the language of many decisions, on the first blush, appear to be outrageous and excessive. Upon a careful examination of the testimony in this case, we are not struck with such a disproportion between the verdict and the value of the corn, as would warrant us to say that this verdict is excessive. The evidence on this point is somewhat contradictory. The plaintiff in error offered, in February, to give 62½ cents per barrel for the corn. At that time good corn was worth one dollar and 25 cents per barrel. In May, one crib of the corn was sold at 75 cents per barrel, and one other crib was as good as that which was thus sold. The jury may have correctly presumed that the preservative care of the owner applied to the corn in February would have secured an average price equalling that which it gave.

It is also contended that the decree rendered in the chancery cause in Kentucky, is conclusive in this suit, as the subject-matter of each is the same. The position is unquestionably correct, that the judgment of a Court of competent jurisdiction is conclusive between the parties, the same matter being in controversy. To give it, however, this conclusive effect, it should be pleaded as an estoppel. *Outram v. Morewood*, 3 East, 346. In the case

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of *Vooght v. Winch*, 2 Barnew. & Ald. 662, the Court of King's Bench, upon a review of the cases upon the subject of estoppels, decided that if the estoppel is not relied upon, but issue is taken on the fact, the jury will not be bound by the estoppel. The same doctrine is found in 1 Stark. on Ev. 205. The defendant has relied upon the general issue. The record with other testimony is given to the jury; they weigh it, and if they think, notwithstanding the decree, that the case is with the plaintiff, they can find accordingly. *Church v. Leavenworth*, 4 Day, 274; *Canaan v. G. W. Turnpike*, 1 Conn. 1.

We are therefore of opinion, that the Circuit Court acted correctly in refusing a new trial.

STEVENS, J., having been of counsel in the cause, was absent.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

Hawk and Smith, for plaintiff.

Sullivan, for the defendant.

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*LONGWORTH v. CONWELL.

SPECIFIC PERFORMANCE—POWER OF AGENT—PERFORMANCE OF CONDITION.

—A. agreed in writing to sell to B. a tract of land for a certain sum. Payment to be made by B.'s delivering to A., or to his agent C., a boat and cargo of produce by the first rise of the Ohio river sufficient to take boats over certain rapids in the river. If the boat, &c. could not be prepared by the time specified, the payment was to be subsequently made in a different manner. The conveyance to be made when the land should be paid for. B. took possession of the land; and delivered the boat and cargo to C., as A.'s agent, but not till several weeks after the first rise of the river sufficient for the purpose above mentioned. C. took the property to N. Orleans; but what became of the proceeds did not appear.

Held, that C., as the special agent of A. to receive the property, had no authority to receive it after the first rise of the river, &c.; and that the subsequent delivery of the same to him, did not entitle B. to a conveyance of the land from A.

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Held, also, that supposing C. to have been the general agent of A., still the delivery, under the circumstances of the case, of the boat and cargo to C., after the time specified in the contract, was not binding on A.

PRINCIPAL AND AGENT—POWER OF GENERAL AGENT.—It is a general rule, that the principal is bound by the acts of his general agent, though the agent exceed his private instructions. But the rule does not apply to cases where the person dealing with the agent is apprised of the existence of the private instructions.

ERROR to the Dearborn Circuit Court.

BLACKFORD, J.—This is a bill in chancery by Conwell against Longworth. The object of the bill is to obtain a specific performance of a written contract, signed by Longworth, for the conveyance of land. The following is the agreement:

“Memorandum of an agreement between Nicholas Longworth and Elias Conwell: said Longworth sells him his farm on Hogan creek, bought of Wright, containing 71 acres, at 6 dollars per acre, payable in a boat fit to go to Orleans, at 50 dollars. He is to cork, cover and fix the boat, and said Longworth is to allow him the cost. The balance to be paid, one-third in good white kiln-dried corn meal at one dollar and a half per barrel; one-third in good stable fed beef cattle at the market price; and one-third in good corn fed hogs at the market price. If the parties can not agree on the price and weight, the same to be fixed by two persons mutually chosen, and they to have liberty, if necessary, to choose an umpire. The boat and articles on board to be by said Elias Conwell delivered to said Longworth, or his agent, O. Walker, by the first rise of the river sufficient to get over [*470] the falls; or should said Elias Conwell not be *able to prepare the boat and loading by that time, the land to be paid for in good stall fed beef cattle, to be delivered in parcels or together at any time within one year, at Aurora or in Cincinnati, at the market price to be fixed by men as aforesaid. And said Longworth to be notified when any are ready for delivery; and as much as 80 dollars’ worth must be delivered at a time, if delivered at

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Aurora. Interest from this date till paid. A clear deed to be made as soon as the land is paid for. Witness our hands this 16th Sept., 1822.—N. Longworth. I would prefer Walker should change the contract so as to have the meal delivered in good, tight, merchantable hogsheads.—N. L.”

The bill avers that, by virtue of the agreement, the complainant entered into possession of the land, and that he had paid the consideration, by a delivery of the produce to Walker, the agent of the defendant, according to the contract. The prayer of the bill is, that the defendant be decreed to execute a good deed to the complainant for the land, &c.

The defendant admits, in his answer, the execution of the agreement. He says, however, that the produce was not delivered by Conwell on the first sufficient rise of the Ohio river, as the contract required; and that he is not bound by the subsequent receipt of it by Walker as charged in the bill. He says, also, that as the payment for the land had not been made to the defendant, nor to any person authorized by him to receive it, he was under no obligation to execute the deed to the complainant; and that he had accordingly refused to do so, except upon a certain condition (stated in the answer and which will be hereafter noticed); with which the complainant refused to comply. The defendant further states, that the complainant afterwards filed his claim for the price of the boat and cargo against the estate of Walker, who had died in New Orleans; and that it was not until that estate was ascertained to be insolvent that he filed the present bill against the defendant.

The decree of the Circuit Court is in favor of the complainant.

The following is the material part of the testimony:

It is proved that Conwell, on the 4th of November, 1822, delivered to Walker, as the agent of Longworth, a boat with a cargo of produce, valued by the two

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[*471] former at 426 dollars, which *was the sum that had been agreed on for the land. It is also proved, that subsequently to the date of the contract, and three or four weeks before the delivery of the property, there was a rise in the Ohio river high enough to take boats over the falls, and higher than the one was when the property was delivered. It is also proved, that Conwell had sold to Walker a considerable quantity of tobacco, which the latter took with him to New Orleans, when he went with the other produce he had received from the former; and that this tobacco was not of the quality represented by Conwell, and brought at New Orleans but little more than one-half the price that he had charged Walker for it.

It is proved also, that, after the delivery of the property at Aurora to Walker, Conwell went to Cincinnati, where Longworth resided, showed him Walker's receipt for the property, and demanded a deed. Longworth refused to execute the deed, on the ground that the property had not been delivered on the first sufficient rise of the river, and that Walker had no authority to receive it afterwards. But, after some conversation, Longworth expressed his willingness to sanction the reception of the property by Walker, provided Conwell would agree that, in case Walker should sustain a loss on the tobacco, no part of the property received for Longworth should go to pay Conwell for that loss. This proposition of Longworth, Conwell refused to accept, and the deed for the land was consequently not executed by Longworth. It is proved that Walker died on the Mississippi in the summer of 1823, and that afterwards, and after Longworth's refusal to execute the deed, Conwell filed the following claim in Court, against the estate of Walker, for the price of the boat and cargo in question: "The estate of Obadiah Walker, dec'd, to Elias Conwell, Dr. To one flat boat and loading, provided I fail to get the land from N. Longworth, which I bought of him—\$426.00—Elias Conwell." After this, Conwell informed one of the witnesses, that he

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did not intend to give up his claim to the land he had bought of Longworth; but that he would get what he could from the estate, and as he did not expect the estate would pay him the whole, he would look to the land for the balance.

This is believed to be the material evidence given in the cause.

[*472] *According to the terms of the contract upon which the present bill is founded, the complainant, Conwell, could have no right to demand from the defendant, Longworth, a deed for the land in controversy, unless he had previously made full payment for the same, or done that which was equivalent. The consideration-money was 426 dollars; and the complainant had his choice of two modes of payment. First, he might deliver at the first sufficient rise of the Ohio river after the date of the contract, to the defendant or his agent Walker, a boat and cargo of produce for the New Orleans market worth 426 dollars; or, secondly, he might pay the amount in beef cattle, to be delivered at Aurora or Cincinnati, within one year after the contract. The complainant relies alone upon his having paid the consideration, according to the mode of payment first above-mentioned. The delivery of the property was not made to the defendant in person, but to Walker as his agent; nor was it made at the first rise of the river as had been agreed on, but several weeks afterwards. And the great question upon which this case must be decided is, Was that delivery, so made to Walker, a performance of Conwell's part of the contract?

The time fixed by the agreement for the delivery of the property was very material. It was the defendant's interest to have the produce in market as early as possible, and he could not be obliged to receive it after the time stipulated for its delivery. Walker, however, as the agent of the defendant, did receive it afterwards, and took it to New Orleans. It is material, therefore, to examine whether Walker's authority to receive the property ex-

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tended beyond the time limited by the contract for its delivery.

The complainant contends, in the first place, that Walker's authority to receive the property when he did, is contained in the agreement itself. It is said in the contract, "The boat and articles on board to be by said, Elias Conwell, delivered to said Longworth, or his agent, O. Walker, by the first rise of the river," &c. There is nothing in these words giving any authority to receive the property after the first rise of the river. Had a distinct power of attorney been executed, authorizing Walker to receive the boat and cargo for the defendant, at a particular time, it is clear that the power would have expired with the appointed day. The law must be the same in this case.

[*473] *Here the agency created by the terms of the contract was a special one; it was merely for the receipt of certain specified property at a fixed period; and the power expired when that period was past.

The complainant contends, in the second place, that a general agency is proved, independently of anything contained in the contract. In this he is mistaken. The defendant answers the bill, on this point, as follows: "That Obadiah Walker, in his life-time, and Edward Walker, since his death, and perhaps before, were to a certain extent attending to his business. Said Obadiah Walker had no written authority or verbal one further than this: he received money from respondent and paid taxes for him; if persons wished to buy land, he showed the land and proposed terms; but he had no authority even verbal to make contracts. But if he made terms that met respondent's views, he made written contracts with the parties; if not, said Walker had no power to make contracts for him or bind him; nor does respondent recollect that he ever attempted it, except in the reception of the boat and cargo aforesaid." The witnesses prove nothing more than this statement of the defendant. There is surely nothing

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in this like a general agency for the transaction of all kinds of business, or of the one kind relating to the purchase and exportation of produce. Walker seems, from the answer and the depositions, to have been employed merely to pay taxes, and make and receive propositions respecting the purchase of lands which the defendant had for sale, subject entirely to the subsequent agreement or disagreement of his employer. He could make no contract of any kind which would bind the defendant. It is idle, then, to say anything about a general agency, appearing from the testimony, *dehors* the contract on which the bill is founded.

But even if a general agency had been proved by the witnesses, as to all kinds or any one kind of business, it would not change the merits of the present case. It is a general rule, to be sure, that the principal is bound by the act of his general agent, although such act may exceed the agent's private instructions. The reason of this rule is, that the persons dealing with the agent can be presumed to be acquainted only with the general authority. *Fenn v. Harrison*, 3 T. R. 757. In the case before us, however, there were no private instructions; [*474] *and it can not, therefore, be brought within the general rule which we have just mentioned, and which was so much relied on for the complainant in the argument of the cause. Here, the complainant did know that Walker's powers, let them as to all other matters be what they might, were limited as to the receipt of this property for the defendant, to the first sufficient rise of the river after the date of the contract. This limitation of the agent's authority was expressly told to the complainant by the terms of the contract itself upon which he has founded his bill. The law, therefore, can not presume Conwell's ignorance of Walker's want of authority to receive the property at the time he did receive it; and had Walker even been the general agent of Longworth,

the latter would not have been bound by this unauthorized act. *Cessante ratione, legis cessat ipsa lex.*

The opinion to which we have arrived is—that whether Walker be considered a special or a general agent, the complainant's delivery of the boat and cargo to him at the time he did deliver it, was not such a performance of his part of the contract with the defendant as could entitle him to a deed for the land in question.

There is nothing in any other part of the evidence, not yet commented on, which can affect this conclusion against the complainant.

The defendant refused to execute the deed, when called on by the complainant, soon after Walker's departure with the produce. The same reason was then given for the refusal that is insisted upon now. The terms upon which, at that time, the defendant proposed to execute the deed, notwithstanding his legal right to refuse, were of the most reasonable kind; and the complainant in refusing to comply with them, plainly showed that he had no claim to any favors from the defendant. The latter, accordingly, very properly told the former, that he must look to Walker for the property, with which he had chosen to entrust him. It appears that, after this, the complainant himself thought it advisable not to lose sight of the estate of Walker. The filing of his account against Walker's estate for the produce, though with the proviso attached to it—and his statement to one of the witnesses,

that he intended to get what he could from the [*475] estate, and look to the land for the balance—*show that the complainant's confidence in his claim to the land in question was far from being perfect.

The last ground taken by the complainant is that as the defendant has not denied his receiving the proceeds of the boat and cargo, and has proved that he did not receive them, the Court must presume these proceeds to have come into his hands. In answer to this it is quite sufficient to observe, that the defendant is not charged in

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the bill with the receipt of these proceeds, nor is there any evidence in the record as to what became of them. If the complainant wished to show that the defendant, by receiving the money arising from the sales of the produce, had recognized Walker's unauthorized receipt of that produce, it was surely for the complainant to prove the defendant's receipt of the money. He has offered, however, no evidence of this fact; and has no foundation, of course, for this last point relied on to sustain the cause.

It is the opinion of the Court, for the reasons which have been given, that the complainant in this case has not shown himself entitled to the land claimed in his bill; and that the decree of the Circuit Court, in his favor, should be reversed.

STEVENS, J., having been of counsel in the cause, was absent.

Per Curiam.—The decree is reversed with costs. Cause remanded to the Circuit Court, with directions to dismiss the bill, &c.

Caswell, for the plaintiff.

Lane and Holman, for the defendant.

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GRAND JURY—CHALLENGE OF—PRACTICE.—A person under a prosecution for a capital offence about to be submitted to a grand jury, may challenge any of the grand jurors for cause, but not peremptorily (*a*.)

SAME—BELIEF IN DEATH PENALTY.—One of the grand jurors in such a case in answer to a question put to him by the prosecuting attorney, said, "that he thought he could not in his conscience find any man guilty of an offence that would subject him to death." *Held*, that the juror was disqualified.

JURY—CHALLENGE OF—PRACTICE.—Challenges to petit jurors are first made by the prisoner, and afterwards by the prosecuting attorney.

SAME—DISPOSAL DURING CONTINUANCE.—The record in a capital [*476] case showed, that, after the petit jury were sworn, the Court *adjourned from one day to the next, but it did not show that the jury

(a) 51 Ind. 14; 22 *Id.* 347.

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were legally disposed of during the adjournment. *Held*, that a verdict and judgment against the defendant must, under those circumstances, be considered erroneous (b).

ERROR to the Bartholomew Circuit Court.

STEVENS, J.—Jones, the plaintiff in error, was indicted for the murder of John Ray, tried by a jury, found guilty, and a judgment of death rendered by the Court against him on the verdict of the jury. To reverse which judgment this writ of error is prosecuted.

It appears of record by a bill of exceptions that, at the time of impaneling the grand jury that found the bill of indictment, Jones was in prison in the custody of the sheriff on the charge for which he was indicted and convicted; and by order of the Court was in Court at the time the grand jury was being sworn; and that he claimed the right of peremptorily challenging the jurors without showing any cause, which the Court overruled, but permitted him to challenge for cause; that he challenged one Isaac Parker for cause, and Parker was sworn to answer questions touching his qualifications, and after being examined by Jones, was by him accepted; upon which, the attorney prosecuting the pleas of the state asked the juror, "*if he could in his conscience find any man guilty of an offence which would subject him to the punishment of death?*" To the asking of which question Jones objected, but the Court overruled the objection and required the juror to answer; and the juror answering that, "*he thought he could not in his conscience find any man guilty of an offence that would subject him to death,*" he was by the Court for that cause set aside.

It also appears of record by the bill of exceptions that after the bill of indictment was found, and the defendant had been arraigned and pleaded not guilty, and while the petit jury was being impaneled and sworn, the defendant moved the Court to require the attorney prosecuting the pleas of the state, to first examine the jurors and accept

(b) 28 Ind. 22; modified, 7 Id. 271.

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or reject them, before the defendant should be called on to make his election; which motion the Court overruled and required the defendant to first make his election, and after he had accepted, the attorney prosecuting the pleas of the state should then be at liberty to make his challenges, if any he had to make: and under that decision of the Court James Jones and other jurors were [*477] set aside by the attorney prosecuting, after the defendant had chosen them.

It further appears of record, that the petit jury was impaneled and sworn on Wednesday, and that before any evidence was heard, the Court remanded the defendant into the custody of the sheriff, and adjourned until Thursday morning, eight o'clock; but the record is entirely silent as to what was done with the jury.

The first point in this case is, Did the Circuit Court err in not permitting the defendant to challenge grand jurors peremptorily?

There is no statute or sanctioned practice in this state, authorizing a prisoner to peremptorily challenge grand jurors; and it is believed that no such practice exists in England. The common law requires grand jurors to be good and lawful freeholders, and the English statutes require several additional qualifications; and Chitty in his treatise on criminal law, when speaking of those qualifications of grand jurors, says that a prisoner, who is at the time under a prosecution for an offence about to be submitted to the consideration of a grand jury, may challenge any of the grand jurors, who lacks any of those qualifications required by the common and statute laws. Chitty refers to Hawkins' Pleas of the Crown, where it is said that a challenge to grand jurors is very properly limited to persons who are, at the time, under a prosecution for an offence about to be submitted to a grand jury. By these authorities it is clear, that, in England, these challenges are limited to one certain class of cases, and then only for cause. We are therefore of opinion that the Circuit Court decided correctly. (563)

The next point is, Did the Court err in permitting the attorney prosecuting to ask the grand juror, "if he could in his conscience find any man guilty of an offence which would subject him to the punishment of death," and in setting aside the juror for answering that he "thought he could not?"

The plaintiff contends that our statute does not authorize the asking of such a question, and that it can not be asked without the aid of a statute. It is correct that, without the aid of a statute, no question can be asked a juror that tends either to his disgrace or his dishonor;

but the authorities all show what is to be understood [*478] by that. Many of the cases under that *head are summed up in Bacon's Abridgement, title Juries, letter E, and in the case of *The King v. Edmunds*, 6 Sergeant & Lowber, 502, 503. It can not be asked a juror, if he has been either charged with, imprisoned for, or convicted of a crime, or if he is a villein or an outlaw, because these questions tend to his disgrace. Nor can it be asked him, whether he has formed or expressed an opinion of the prisoner's guilt; because, if he has formed or expressed an opinion through ill-will, malice, or hatred to the prisoner, it is dishonorable, and if he has formed or expressed his opinion honestly, from his correct knowledge of all the facts of the case, it is no cause of challenge (1). The question asked the juror, in this case, has nothing to do with the guilt or innocence of the prisoner, nor is it respecting any improper act or conduct of the juror, nor could it tend to either his disgrace or dishonor. It was a general question upon an abstract principle, and therefore, under the circumstances of the case, might be properly asked. The object, in these cases, is not to procure a jury that will acquit the guilty or convict the innocent, but to select such men as will impartially hear and examine, and acquit the innocent and convict the guilty. A grand jury is the great inquest between the government and the citizen; an institution that should be preserved in its purity;

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and no person should ever be permitted to take a seat as a member thereof, except such good and lawful men as will impartially and faithfully carry the true objects of the institution into effect. We think the Court did not err.

The next point is, Did the Court err in permitting the attorney prosecuting to challenge a petit juror after the prisoner had accepted him?

The only question on this point is, who shall first make his challenge? If this were a new question and we had it to settle, we should say that the state ought first to make her challenges; but as all the English authorities establish a different doctrine, and no American cases have been seen by us to authorize a different practice, we are bound for the present to sanction what the Circuit Court has done.

The last point is, Did the Circuit Court err in adjourning, after the petit jury was sworn, from Wednesday evening until Thursday morning, without putting the jury under the care and charge of the proper and sworn officers of the Court?

[*479] *If it is a fact, that the Circuit Court did so adjourn without disposing of the jury, by putting them under the charge and care of the proper sworn officers of the Court, it is admitted without controversy to be error; but it is insisted that we are bound to presume that the Court acts correctly in all cases of discretion, unless the contrary appears of record by a bill of exceptions. It is, as a general principle, correct to presume that a Court acts correctly in matters of discretion, unless the contrary appears of record, if the record shows that the Court did act upon the subject. Our statute requires, in cases of appeals and writs of error, that the Circuit Courts shall cause to be certified to us a full and complete transcript of all its proceedings; and this transcript is so certified; and we are bound to believe that nothing more was done than what is certified to us to have been done. We can not, by intendment, supply any material proceed-

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ing which is entirely omitted. There are no words in this record by which we can supply, by intendment, that the jury was legally and correctly disposed of by the Court during that adjournment. 2 New York T. R. 373; 8 Johns. Rep. 437; 11 Johns. Rep. 442; *King v. Stone*, 6 D. & E. 530. We think this is a material and substantive error, and one which can not be cured by intendment; and therefore the judgment and proceedings of the Circuit Court, subsequent to the plea of the prisoner, and the making up of the issue to the country, must be reversed and set aside, and the cause remanded, with instructions to award a *venire de novo*, and proceed to trial with the issue, &c.

Per Curiam.—The judgment is reversed, &c. Cause remanded, &c.

Sweetser, for the plaintiff.

Brown, Herod, and Lane, for the state.

(1) Vide *Hudson v. The State*, Vol. 1 of these Rep. 317. In a note to that case, a statute of 1828 is referred to, which authorizes certain questions to be asked of the jurors, as to their having formed or expressed any opinion relative to the guilt or innocence of the prisoner. There is a similar statute of 1831. R. C. 1831, p. 197.

[*480]

*RABURN v. SHORTRIDGE.

JUDGMENT—INJUNCTION AGAINST—A judgment by default having been rendered against A., on a note previously executed by him to B., the former filed a bill in chancery to enjoin the judgment—stating the note to have been given, and the judgment rendered, on a certain condition which had not been complied with. The answer, which was supported by the deposition, denied the complainant's allegations. The Court dismissed the bill.

SAME—SAME—REMEDY.—The want or failure of consideration is a good defence to an action at law on a note, but if the defendant neglects to make this defence, and suffers judgment by default, he can not, without a strong case, be relieved in chancery (a).

WILL—RIGHTS OF DEVISEE AND GRANTEE.—If land devised be afterwards sold by the devisor to a stranger, the devisee takes nothing by the devise.

(a) 12 Ind. 42; 6 *Id.* 127.

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APPEAL from the Montgomery Circuit Court.

M'KINNEY, J.—This is a suit in equity. On final hearing upon bill, answer, and depositions, an injunction granted was dissolved, and *ten per cent.* decreed upon the judgment enjoined, with costs, &c. From that decree the complainant has appealed.

The bill charges that the complainant, on the 17th day of December, 1825, executed a note to the defendant for the sum of 100 dollars, upon which judgment was rendered against him by default at the September term, 1826, of the Montgomery Circuit Court; that the note was given, and the judgment rendered, upon the express condition that the defendant should, as soon as judgment was rendered, join with his wife in the conveyance of 121 acres of land to one Joseph Corbett; that said land was devised to Emily Heath, now the wife of the defendant, by the will of William Nicholson, deceased, dated the 11th of September, 1822, and directed to be conveyed to her by John Raburn, Sen.; that after said devise the testator sold the land to Joshua Baxter, by whom it was sold to Joseph Corbett, who was to receive a deed from John Raburn, Sen., upon the death of the testator; that the testator, in lieu of the land devised to Emily Heath, entered 100 acres, which were given to her; that the defendant and his wife have refused to receive a deed from John Raburn, Sen., according to the will of the testator, to prevent a title being made to Corbett; that the complainant purchased of the wife of the defendant the 100 acres of land given to her by William Nicholson, [*481] deceased, and *received a deed for the same; that at the time of the purchase he gave the defendant the note for 100 dollars, in consideration that he and his wife should receive a deed from John Raburn, Sen., for the 121 acres devised by William Nicholson, and convey the same to Baxter, to enable him to convey to Corbett; that the defendant had an execution issued on the

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judgment against the complainant, and that it was levied on his land; and prays an injunction.

The defendant answering, positively denies that the consideration of the note, upon which the judgment was rendered, was that stated by the complainant, but says that the note was given for his wife's share, as one of the heirs of William Nicholson, deceased, of a lot of land entered by said Nicholson, and which he and his wife sold and conveyed to complainant. He denies that he knew of the sale by Nicholson of 121 acres of land to Baxter, or of the sale by Baxter to Corbett; denies that he had any knowledge of 100 acres of land being given to his wife, in lieu of the 121 acres to be conveyed to her by John Raburn, Sen.; denies his refusing to receive a deed from John Raburn, Sen., to prevent a title being made to Corbett. But he says that some considerable time after the rendition of the judgment against the complainant on the note for 100 dollars, a deed of some kind was shown to him which he refused to receive, having previously given authority to an agent to receive a deed from John Raburn, Sen., who lived in the state of Ohio.

It is well settled that when relief is asked in a Court of chancery, the bill, on its face, should present a case founded on some of the grounds of its jurisdiction, which will warrant its interposition. The Court can not delve into extrinsic matter, or create an issue *dehors* the pleadings of the parties, to sustain a bill or afford relief. This remark arises from an examination of the depositions taken in this case. They are contradictory, and embrace matter most of which is entirely inapplicable and irrelevant to the issue before us. The same directness of testimony, required in an issue at law, is necessary in an issue in chancery. The rules of evidence are the same in both Courts. In neither can you support an issue by testimony extrinsic and foreign to it. Thus tested it is obvious that little of the testimony in this case is properly applicable to it.

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If the note complainant executed was without [*482] *consideration, or the consideration failed, the failure of consideration would have been a good defence at law. *Leonard v. Bates*, 1 Blackf. Rep. 172. If the defendant instead of availing himself of such defence, waives it, and suffers judgment to go against him by default, a strong case must be made out or a Court of chancery will not interfere. *Clay, &c., v. Foy*, 3 Bibb, 248. We think that, in the examination of the bill no such case is presented. There appears a palpable incongruity in the allegation of the complainant, "that the note was given, and the judgment rendered, upon the express condition and understanding that the defendant should, as soon as the judgment was rendered, join with his wife in the conveyance of 121 acres of land to one Joseph Corbett," &c. It would seem from this allegation that the execution of the note and the rendition of the judgment were simultaneous. This is, however, opposed by the previous statement, that the note was executed on the 17th of December, 1825, and the judgment rendered in September, 1826. It may be asked, was the note executed with a view to the judgment by default, and was the consideration of such judgment a constituent part of the consideration of the note? If the consideration of the note, and that for the judgment by default, were distinct, the question arises, is the equity relied on founded on the failure of the consideration of the note, or upon the non-performance of the condition inducing the rendition of the judgment? If upon the failure of the consideration of the note, we do not think the complainant has offered a sufficient cause to justify the interposition of a Court of equity. He had an available defence at law and neglected to use it. *Vigilantibus non dormientibus leges subveniunt*. If the relief asked is predicated upon the latter, in the absence of fraud, and fraud is not specifically charged in the bill and is not to be presumed, the complainant is not entitled to it.

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Another allegation in the bill may, however, aid in the application of that just noticed. It is the allegation, "that the consideration of the note was that the defendant and his wife should receive a title from John Raburn, Sen., to the 121 acres of land, and convey the same to Baxter, to enable him to convey to Corbett, under the agreement made by William Nicholson in his life-time with said Baxter." Here is another consideration alleged for the note. In this, the rendition of a [*483] judgment *upon the note is not intimated as inducing its execution. These allegations are at variance with each other. The conclusion to which we are brought by the examination of the first, is not changed by that of the latter.

The complainant also alleges that he purchased the interest of the defendant's wife in the 100 acres of land given to her by William Nicholson, and received a conveyance of it from the defendant and his wife; that the note was given, at the time of the purchase and conveyance executed, for a consideration distinct from the purchase. He, however, does not state what consideration, if any, he gave for that interest. A conveyance of land is always predicated upon a consideration. Such consideration may be either good or valuable. The complainant purchased and received a conveyance of the defendant's wife's share of the 100 acre tract, but is silent as to the consideration.

The reference to the will of William Nicholson does not strengthen the complainant's case. A will is without effect until the death of the testator. If William Nicholson, by his will in 1822, devised land, the interest of the devisee would be divested by a sale subsequently made by him. Such a devise is charged to have been made to Emily Heath, the wife of the defendant, and a sale to have been subsequently made to Baxter. If the sale was made and was valid, the devise to Emily Heath became inoperative, and, as far as we can perceive, her agency was not

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necessary to confirm the title of the testator's vendee. If the agreement between the testator and Baxter was parol, such acts may have been mutually performed as would have taken the case out of the operation of the statute of frauds, and have enabled its enforcement. The right to enforce would have been incident to the agreement, and not have attached to the devise by the vendor. The bill does not show whether the agreement between William Nicholson and Baxter is subsisting and in force, or abandoned.

The positive denial of the answer, and the consideration stated, are fully sustained by the depositions of James Still and Morgan Shortridge, witnesses to the execution of the note and of the conveyance of the land which the complainant alleges he purchased of defendant's [*484] wife. These witnesses are *unimpeached. Their testimony is entitled to great weight. The decree of the Circuit Court must be affirmed.

Per Curiam.—The decree is affirmed, with 3 *per cent.* damages and costs.

Kinney, for the appellant.

Fletcher, for the appellee.

PENNYBAKER v. THE STATE.

HUSBAND AND WIFE—CRIME OF WIFE.—If a wife commit an indictable offence, without the presence or coercion of her husband, she alone is responsible for the offence (*a*.)

ERROR to the Owen Circuit Court.

M'KINNEY, J.—This was an indictment for retailing spirituous liquors without a license. Plea, not guilty; and, by consent, the cause was submitted to the Court

(a) See 51 Ind. 192; 44 *Id.* 91; 43 *Id.* 550.

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without the intervention of a jury. The defendant was found guilty, and judgment rendered against him. A bill of exceptions, taken to the opinion of the Court overruling a motion for a new trial, furnishes the evidence upon which the judgment of the Court was founded.

A single question is presented for our consideration. Can the judgment be sustained on evidence that the whisky, charged in the indictment to have been sold by the defendant, was sold by his wife, he being absent from his house, and no authority proved to have been given? We think the evidence insufficient to establish the liability of the defendant. The presumption of agency is inadmissible. The wife, committing offences without the presence or coercion of her husband, is regarded as a feme sole. She is alone responsible. 1 Russell on Crimes, 25; 1 Chitty's Bl. 348 and note 51.

Per Curiam.—The judgment is reversed. To be certified, &c.

Whitcomb, for the plaintiff.

Brown, for the state.

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FRAUDULENT JUDGMENT AND CONVEYANCE—REMEDY OF CREDITORS.—A person against whom suits were depending for *bona fide* debts, confessed a judgment in favor of another, without consideration, to defraud his creditors. The debtor's real estate was purchased, under an execution on this judgment, by the judgment-creditor. Judgments were afterwards obtained, by the *bona fide* creditors, in their respective suits, and executions issued thereon and returned "no property found." The Court on a bill filed by the *bona fide* creditors, set aside the fraudulent judgment, execution, and sale, and ordered the land to be sold to satisfy the complainants' demands.

M'KINNEY, J.—Suit in chancery, certified from the Knox Circuit Court, prior to a decree, the President Judge having been of counsel for one of the parties.

The bill is filed by Bruner in behalf of himself and Clark and Graeter, judgment-creditors of Charles Allen, deceased. It charges that Charles Allen, without consideration, and to defraud his creditors, on the 27th of September, 1824, in the Knox Circuit Court, confessed judgment in favor of Charles Manville for the sum of 3,013 dollars and 50 cents; that execution was sued out on the succeeding day, and levied on all the real and personal estate of the defendant Allen; that it was sold, the former being 600 acres of land, for 305 dollars, and the latter for 277 dollars and 12½ cents; that it was all purchased by the said Charles Manville; that the execution issued and the sale was made fraudulently, by agreement between the parties, to defraud the creditors of Allen. The death of Allen, and the grant of administration on his estate to Charles Manville, on the 7th of May, 1825, are stated. It further charges, that the complainant and the other judgment-creditors respectively recovered, in the Knox Circuit Court, judgments against the said Charles Manville, administrator of Charles Allen, deceased—the complainant, on the 23d of March, 1827, for 246 dollars and 50 cents—the said Clark, on the 22d of August, 1826, for 168 dollars and 50 cents—and the said Graeter, on the 20th of March, 1827; that executions on said judgments were issued on the 9th of April, 1827, and each returned “no property found;” that said judgments are unpaid, and there is no property of the said Allen by which they can be satisfied.

The death of Charles Manville is also charged, [*486] and the grant of *administration on his estate to Eli Manville, one of the defendants. The heirs of Charles Allen and of Charles Manville, and the administrator of the latter are made defendants. It prays, 1st, an injunction to restrain the administrator, Eli Manville, from procuring an order to sell the land described in it: and 2d, that the judgment confessed by Charles Allen in favor of Charles Manville be set aside, and that the

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land purchased by said Charles Manville be subjected to the judgments in favor of the complainants.

The bill was taken as confessed against the administrator for want of an answer, and answered by the guardians ad litem of the heirs, and by Wilkins and his wife Sarah, late Sarah Manville. Its allegations are not denied, but proof required. The testimony fully supports the charges in the bill. The avowed object of the parties was to protect the property of Allen from the claims of his creditors. Suits instituted by the complainants were pending at the term the judgment was confessed. The law permits a debtor to prefer one creditor to another, but this must be done *bona fide*. The vested rights of others can not be affected. *M Menomy v. Rooserelt*, 3 Johns. Ch. Rep. 446. If Allen had been indebted to Manville to the amount of the debt, the judgment would have been valid. The testimony shows the contrary. Shall this judgment then operate to the prejudice of Allen's creditors? We think not. The fraud with which it is tainted avoids it. The complainants have used the proper diligence. They are entitled to relief. It is well settled that equity will relieve against judgments obtained by fraud. *Reigal v. Wood*, 1 Johns. Ch. Rep. 402; 1 Madd. Ch. Rep. 236. The judgment thus confessed is void. It created no valid lien upon the land of Allen. The title of the purchaser, himself a party to the fraud, can not be sustained. *Livingston v. Hubbs and others*, 2 Johns. Ch. Rep. 512.

Per Curiam.—It is decreed, &c., that the judgment confessed, &c., the execution, sale, sheriff's deed, &c., are fraudulent and void, &c.; and that the land be sold, &c., to satisfy the complainants, &c.

Judah, for the complainants.

Kinney, for the defendants.

END OF NOVEMBER TERM, 1831.

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AMENDMENT.

See EJECTMENT, 6; EXECUTORS AND ADMINISTRATORS, 11.

A declaration in covenant, not showing the writing declared on to be under seal, was amended by the insertion of words describing the instrument as a writing obligatory. *Held*, that this was an amendment in substance, and entitled the defendant, under the statute, to a continuance.—*Kelly v. Duignan et al*.....420

ANSWER.

See CHANCERY, 13-15, 18-21, 24, 26, 27, 30; EVIDENCE, 1.

APPEAL.

See COSTS, 4, 5.

APPEARANCE.

See INQUIRY, WRIT OF, 1.

ARREST.

The arresting of an offender, and the re-taking of him on fresh pursuit after an escape, constitute but one effective arrest.—*Cooper v. Adams et al*.....294

ASSAULT.

See INDICTMENT, 1, 2

ASSAULT AND BATTERY.

See JUSTICE OF THE PEACE, 1, 2;
SLANDER, 1.

ASSESSMENT OF DAMAGES.

See DAMAGES; DEMURRER TO EVIDENCE, 3.

ASSIGNMENT.

See BOND, 1, 4, 5; JUDGMENT, 6, 7;
PROMISSORY NOTES, 2-7.

ASSIGNMENT OF BREACHES.

See BOND, 9; DAMAGES, 7.

ASSUMPSIT.

See CONDITION PRECEDENT, 3; CONTRACT; PARTIES, 3; VENDOR AND PURCHASER, 12.

ATTACHMENT.

See REPLEVIN, 6.

1. When a creditor comes in, during the pendency of an attachment commenced by another, to obtain a judgment under the statute, his claim must be set forth with the same certainty that, in any other action, is required in a declaration. *Gilly v. Breckenridge*.....100
2. An affidavit in attachment can not be objected to for not describing the nature of the debt, if the same be described in a declaration filed in the cause.—*O'Brien et al v. Daniel et al*.....290
3. The affidavit, in the case of a domestic attachment, must state the county in which the debtor had recently resided.....*Ibid*.

ATTACHMENT-BOND.

See BOND, 8; DAMAGES, 6, 7; PLEADING, 23.

ATTACHMENT FOR CONTEMPT.

See TRESPASS, 4.

ATTESTING WITNESS.

See WITNESS, 1, 2, 4.

ATTORNEY.

See RETRAKIT.

A., an attorney, received a note from the payee for collection, and, without the payee's knowledge, delivered it to B., another attorney, to collect. B. collected the money and failed to pay the same to the payee. *Held*, that A. was liable to the payee for the money collected by B.—*Pollard v. Rowland*.....22

AVOWRY.

See REPLEVIN, 5, 7.

B

BANK OF INDIANA, FARMERS AND MECHANICS'.

A promissory note dated the 1st of

July, 1826, payable to the President and Directors of the Farmers and Mechanics' Bank of Indiana, at their office of discount and deposit at Lawrenceburgh, on the 1st of July, 1829, is not entitled, under the statute, to days of grace; nor is it a paper in which the corporation is prohibited by its charter from holding an interest.—*John et al. v. The Farmers and Mechanics' Bank of Indiana*.....367

BASTARDY.

1. An order by the Court of filiation and bastardy may be enforced by scire facias or debt on the order against the putative father, or on the recognizance against those who have entered into it, in the name of the state, on the relation of the party entitled.—*Harrington et al. v. Ferguson*.....42
2. The scire facias or declaration, in such case, must describe the cause of action of the party claiming, show by what authority he has had the care of the child, and why he is entitled to the benefit of the order for maintenance.....*Ibid.*
3. The prosecution, under the statute for the support of illegitimate children, should be in the name of the state.—*Dickerson v. Gray*.....230
4. The order of the Court, in a case of bastardy, after stating what sum the father must pay for the maintenance of the child, should be—that the defendant pay the money to the person who shall maintain the child, or become entitled to the same by law; and that he enter into a recognizance with one or more sureties, for the performance of the order.....*Ibid.*
5. The provisions of the 77th section of the act of 1824, relative to crimes and punishments, requiring certain actions to be brought within one year next after the offence committed, do not apply to prosecutions under the act for the support of illegitimate children.—*The State v. Stafford*.....412

BILL OF EXCEPTIONS.

See ERROR, 9.

BILLS OF EXCHANGE.

See PROMISSORY NOTES, 2.

1. A bill drawn on an administrator in these words, "Please to settle 80 dollars out of my part of the estate, with Nathan Harness, and this my order shall be your receipt for the same," is not a valid bill of exchange; being payable only out of a particular fund.—*Mills et al. v. Kuykendall*.....47
2. A declaration against the acceptor of such a bill, depending alone for its support upon the bill and acceptance, contains no cause of action, whether the acceptance be absolute or conditional.....*Ibid*
3. If the payee of a bill of exchange accepted for the drawer's accommodation, give time to the drawer without the acceptor's knowledge, the latter is not thereby discharged; though the payee knew that the acceptance was made for the drawer's accommodation.—*Lambert v. Sanford*.....137

BOARD OF JUSTICES.

See SEAT OF JUSTICE, 1.

The Board of Justices may be sued, in their corporate capacity, for any legal demand against the county.—*Blackwell v. The Board of Justices of Lawrence County*.....153

BOND.

See DAMAGES, 4; EXECUTORS AND ADMINISTRATORS, 6-9; LOST BOND; MORTGAGE, 1, 2; PLEADING, 15, 22; VENDOR AND PURCHASER 3, 21.

1. The statute secures to the obligor the same equitable defence in an action by the assignee, that he would have been entitled to had the action been by the obligee.—*Davis v. Clements*3
2. In an action on a penal bond, conditioned for the delivery of property at a certain time and place, the declaration need not aver a demand of the property at the place. *Aliter*, if the condition be for the payment of money.—*Mitchell et al. v. Merrill*.....87
3. The condition of a delivery-bond showed that the property was to be delivered to the person to whom the execution was directed, but it did not state his name. *Held*, that the omission of the sheriff's name did not render the bond void, but that the ambiguity thereby occa-

- sioned might be explained by extrinsic evidence.—*Evans et al. v. Shoemaker*.....237
4. If the maker of a note be notoriously insolvent, the assignee may sue the assignor without having previously sued the maker.—*Youse v. M'Creary*.....243
5. If the assignee of a note can not collect the money from the maker, he may recover from the assignor the amount paid for the assignment, together with interest and costs of the suit against the maker. The amount of the note is *prima facie* evidence of the price received by the assignor; but he is at liberty to prove the real consideration
Ibid.
6. Goods were taken in execution; and a delivery-bond payable to the execution-plaintiff was executed by the debtor and his surety, conditioned for the delivery of the property in as good order as it was at the date of the bond. Debt on the bond. Breach, the non-delivery of the property in as good order as it was when the bond was executed. Demurrer to the declaration, and judgment for the plaintiff.
Held, on the execution of the writ of inquiry, that the sheriff was a competent witness to prove the value of the property. *Held*, also, that, in the absence of all testimony as to the value of the property, the amount of the execution was the proper measure of damages. *Held*, also, that the *quantum* of damages sustained by the plaintiff for the breach of contract was the only subject of inquiry before the jury.—*Chinn et al. v. Perry*.....268
7. In an action on a sheriff's bond against the principal and his sureties, for money collected by the sheriff on an execution in favor of the plaintiff, the defendant can not plead that there is no judgment on which the execution issued.—*The State v. Hicks et al.*.....236
8. An attachment-bond must be approved of by the clerk who issues the writ. His approval, however, is not conclusive but only *prima facie* evidence of the sufficiency of the sureties.—*Blaney v. Findley et al.*.....338
9. On overruling a demurrer to a declaration, in an action on a penal

bond conditioned for the performance of covenants, in which declaration the breaches are assigned, the order of the Court is—that the plaintiff ought to recover his said debt and his damages on occasion of the detention thereof; but that judgment should not be given until the truth of the breaches assigned is inquired into, and the damages are assessed.

After this, if the Court, by agreement of the parties, have inquired into the damages, the opinion is given and entered—that the plaintiff has sustained damages, by reason of the breaches assigned, to the amount of —.

The next and last steps to be taken are, the rendition of the final judgment for the debt in the declaration mentioned with costs; and the award of execution for the damages assessed with costs.—*Glidewell et al. M'Gaughey*.....359

10. A declaration on a bond for security for costs, stating that the plaintiff sues for himself and others, officers of the Court, is bad. Any person interested may sue for himself on the bond, and obtain a judgment for the penalty; and, afterwards, any other person interested, may, upon that judgment, have a *scire facias*. No one, however, has a right to sue for himself and others, officers, &c.
Ibid.

11. It is not sufficient, in an action on such a bond, to state that the defendant has not paid the costs, without setting out the amount of the costs incurred.....*Ibid.*

12. After a lapse of 20 years, without any acknowledgment of the debt, the payment of a writing obligatory may be presumed.—*O'Brien et al. v. Coulter et al.*.....421

BREACH OF THE PEACE.

See JUSTICE OF THE PEACE, 1, 2.

C.

CESTUI QUE TRUST.

See TRUST AND TRUSTEE, 4, 5, 9;
VENDOR AND PURCHASER, 34.

CHALLENGE.

See JURY, 4, 9-12.

CHANCERY.

See DISSEISIN, 3; EJECTMENT, 1; EVIDENCE, 1; EXECUTORS AND ADMINISTRATORS, 15, 18; FRAUDULENT JUDGMENT; GUARDIAN AND WARD; MISTAKE, 2; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER, 9.

1. The payee of a note, who has sued the makers, can not demur to a bill in chancery filed by the latter, because it charges the note to be usurious and prays a discovery, if the complainants have brought the principal and legal interest into Court.—*Harvey v. Crawford et al.* 43
2. The bill in the above-named cause having been taken for confessed, and a decree rendered enjoining the payee's proceedings at law, *held*, that costs might be given to the complainants. *Held*, also, that the decree should secure to the payee his costs in the suit at law. *Ibid.*
3. A., holding a land-office certificate for a tract of land, executed a title-bond to B. for a conveyance at a future time of part of the land, and put him in possession. A. afterwards, sold and assigned the certificate to C., with notice of B.'s equity. D., the assignee of B., having reason to fear that C. would disturb his possession, and sell to a purchaser without notice, filed a bill in chancery to enjoin him from doing so, and obtained a decree accordingly.—*Cupps v. Irvin.* 112
4. The extension of the jurisdiction of Courts of law, in modern times, to cases which were formerly subjects of equitable jurisdiction only, has not destroyed the jurisdiction of Courts of equity.—*Peck et al. v. Braman et al.* 141
5. When accounts are intricate and difficult, a bill in equity is the more usual and suitable proceeding to compel an account; being best calculated to do justice between the parties; since the plaintiff can thereby obtain a discovery of books and papers, and have the benefit of the defendant's oath; who, on the other hand, is entitled to all legal and equitable allowances. *Ibid.*
6. The heirs of A., some of whom were infants, and his representatives filed a bill in chancery against the heirs and representa-

tives of B. The bill stated that B., the guardian of A.'s heirs, having contracted to sell their land to C., procured an order of the Court in Connecticut, where the land was situated, authorizing its sale by D.: that D., pursuant to the order, sold and conveyed the land to C. for 1500 dollars, which amount had nearly all been received by B.; that bonds to the Court were executed by D. and E., conditioned that B. should vest the purchase-money in other land for the heirs of A., or lay it out for their nurture, education, or advancement, and should account to the Court when required, or to the heirs when they should come of age; that B. having married the widow and administratrix of A. became possessed of the intestate's personal estate to a considerable amount: that B. afterwards removed from Connecticut to Indiana, purchased land here with the money of A.'s heirs received as aforesaid, took the title in his own name and died without accounting to them, or leaving personal property sufficient to pay their claim. The bill prayed for a discovery, relief, &c.

Held, that a demurrer to the bill, on the ground of the complainants' remedy being at law, could not be sustained; the case being within the jurisdiction of a Court of chancery. *Ibid.*

7. A decree in chancery is not binding on a person who was not a party to the suit.—*Brown v. Wyncoop.* 230
8. A complainant in chancery may, on payment of costs, dismiss his bill at any time before a final hearing, provided he be not in contempt.—*Smith v. Smith et al.* 232
9. The complainant's mere failure to comply with an interlocutory order of the Court does not of itself so place him in contempt as to prevent him from dismissing his bill on payment of costs. *Ibid.*
10. The return to a subpoena in chancery against Abner M'Carty and John Pegg, was as follows: "Executed on Abner M'Carty, the 25 March, 1826. John Pegg not found. 20 March, 1826—R. John, sh'ff." A decree, reciting that it appeared to the satisfaction of the

- Court that the subpoena had been duly executed, was entered against the defendants *pro confesso*. *Held*, that the return was insufficient to authorize a decree.—*Pegg et al. v. Cupp*257
11. A., B., and C. executed a note to D. for the payment of money. The name of C. was afterwards erased without the knowledge of the other obligors, and a judgment obtained against A. and B. A bill was filed by A. and B. in order to have the judgment enjoined, averring their ignorance of the erasure at the time of the trial at law. *Held*, that the erasure was a defence purely legal, and that the complainants' ignorance of the erasure as averred, was no ground for the interposition of a Court of chancery.—*Shelmire v. Thompson et al.*.....270
12. A. sold to B. a tract of land, and gave him a title-bond conditioned for the execution of a deed for the land, when a patent for the same should be obtained from the United States. A. had paid to the United States one-fourth of the purchase-money. B. executed his notes to A. for the price of the land, payable part in labor and part in money, and agreed to complete the payments due to the United States on the land. A. afterwards assigned the land-office certificate for the land to C., who had notice of B.'s title-bond; and C. paid the balance of the purchase-money due to the United States, and obtained a patent for the land. B. filed a bill in chancery against C., setting out the above facts; averring a performance of the labor, and a payment of part of the money payable to A.; and praying for a conveyance of the land. *Held*, that as the bill did not show a payment or tender of all the money payable to A. by the contract, and a payment or tender to C. of the balance of the purchase-money paid by him to the United States, it should be dismissed for want of equity.—*Dougherty v. Humpston*.....273
13. If exceptions be taken to some parts of an answer in chancery, and the Court consider the exceptions valid, the defendant may be ordered to answer over so far as the exceptions extend, but he can not be required to answer over generally.—*Pegg v. Davis*281
14. If the answer to any particular charge in a bill be not sufficiently explicit, the complainant should file exceptions to that part of the answer; but if instead of doing that, he acquiesce in the answer, the charge must be proved or it will be disallowed.....*Ibid.*
15. If any particular claim in a bill be not answered, the complainant should insist on an answer, and if such answer be refused, he may take a decree *pro tanto* by confession; and then, if the charge is sufficiently explicit, it may be recovered without further proof. But should the complainant, instead of pursuing that course, bring the case to a hearing on the merits, he can only entitle himself to the claim by proving it.....*Ibid.*
16. If the charge in a bill be not stated with sufficient certainty, the complainant can not, even after a decree *pro confesso*, have a final decree, unless he establish his demand by satisfactory evidence.....*Ibid.*
17. One of two defendants in chancery can not be examined as a witness by the complainant, without a special order of the Court.—*Wheeler et al. v. Emmerson*.....293
18. It is a general rule that an answer in chancery is to be taken as true, unless it be disproved by two witnesses, or by one witness and corroborating circumstances. — *Green et al. v. Vardiman et al.*.....324
19. This rule, however, does not extend to everything which the answer contains in favor of the defendant: it applies only to that part of the answer which is directly responsive to the charges in the bill.....*Ibid.*
20. Matters which are set up in avoidance, and which are not responsive to the bill, must, when in issue, be proved by the defendant*Ibid.*
21. If the answer admit a fact, but rely on a distinct fact in avoidance, the defendant must prove the fact on which he relies.....*Ibid.*
22. The assignee of a debt—to obtain certain securities for the same, which had been executed by the debtor to the assignor's attorney, and assigned by the attorney to a

- third person—filed a bill in chancery against the attorney and his assignee. *Held*, on demurrer, that the complainant's assignor should have been made a party.—*Elderkin v. Shultz*345
23. If a person, indebted to several others, absent himself from the state, and leave real estate, to which he is entitled in equity, but no property subject to legal process; the creditors may unite in a bill in chancery to have their claims liquidated, and to make the property liable for the amount.—*Kipper et al. v. Glancey et al.*.....356
24. The Court, on overruling a demurrer to a bill in chancery, should give the defendant a reasonable time to make and file his answer. *Ibid.*
25. A bill in chancery was filed in the Union Circuit Court, to revive a decree in the Franklin Circuit Court in favor of the complainant's ancestor, respecting land situate, at the time of the decree, in Franklin county. When the bill of revivor was filed, the land, in consequence of a change of county boundaries, lay in Union county. *Held*, that the bill of revivor should have been filed in the Franklin Circuit Court; the Union Circuit Court having no jurisdiction of the cause.—*Arnold et al. v. Styles et al.*.....391
26. The merits of the decree can not be disputed by an answer to a bill of revivor.....*Ibid.*
- 27.—The mode of objecting to an answer as insufficient is not by demurring, but by filing exceptions. *Ibid.*
28. It is a general rule, that to reach the equitable interest of a debtor in real estate by a suit in chancery, the creditors should first obtain a judgment at law; and to reach personal property, both a judgment and execution must be shown. One exception to this rule is, where the debtor is deceased; another exception is, where the claim is to be satisfied out of a fund accessible only by the aid of a Court of chancery.—*O'Brien et al. v. Coulter et al.*421
29. If a demurrer to a bill for want of proper parties be sustained, the bill should not be dismissed; but the cause be ordered to stand over for a reasonable time, with leave to amend the bill.—*Lindley v. Cravens*426
30. A bill in chancery, when denied by the answer, must be proved by at least two witnesses, or by one witness and corroborating circumstances, or the complainant can not succeed.—*Jenison et al v. Graves et al*440
31. If an execution-defendant have goods subject to the execution, and they be fraudulently placed by a third person out of the reach of the execution, such third person may be compelled by the execution-plaintiff, in a Court of chancery, to account for the property.....*Ibid.*
32. A judgment by default having been rendered against A., on a note previously executed by him to B., the former filed a bill in chancery to enjoin the judgment—stating the note to have been given, and the judgment rendered, on a certain condition which had not been complied with. The answer, which was supported by the depositions, denied the complainant's allegations. The Court dismissed the bill.—*Raburn v. Shortridge*480
33. The want or failure of consideration is a good defence to an action at law on a note; but if the defendant neglects to make this defence, and suffers judgment by default, he can not, without a strong case, be relieved in chancery.....*Ibid.*

CIRCUIT COURT.

See JURISDICTION, 3, 4; JUSTICE OF THE PEACE, 2.

COMMISSION MERCHANTS.

1. The usages of commerce regulate the duties and privileges of commission merchants, and generally form their contracts in business; which usages are matters of fact and susceptible of proof.—*Rapp v. Grayson*.....130
2. It is as much the duty of a commission merchant to obey instructions, with regard to the shipping of goods deposited with him to be shipped, as it is to keep them safely while in his care. This duty devolves on all who are acting for him as clerks or agents; and, while they are recognized as acting for

- him, their authority must be presumed to be co-extensive with his, as to the business he is thus transacting by them.....*Ibid.*
3. G. deposited goods in the warehouse of R., a commission merchant, and R. agreed to ship the goods to a certain place by a good boat, but not with W. and his boat. R., afterwards, shipped the goods with W. and in his boat. *Held*, in case the goods were lost—first, that R. was liable to G. for the damages sustained by the loss, and that he would have been so liable had he merely contracted for the safe-keeping of the goods; secondly, that even if R. were not bound, in law, to obey the instructions given him as to the shipping of the goods, he would still be subject to the action of G. for delivering the goods to W. contrary to those instructions; thirdly, that though G. might have have recovered against W., and the recovery would have barred a subsequent suit against R., yet G. was not bound to resort to W. But it was also *held*, that the action by G. against R. could not be sustained without proof of the loss of the goods.....*Ibid.*

COMPANY, UNINCORPORATED.

The members of an unincorporated company assumed the name of "The Aurora Association for Internal Improvement;" and in that name, by their agent, executed a title-bond for a lot in the town of Aurora. *Held*, that the bond was not obligatory on the members of the company, and was consequently not a valid consideration for a note given for the price of the lot. — *Vattier v. Roberts*255

CONDITION PRECEDENT.

1. In an action on a contract in which something is to be done by the plaintiff, on condition of which the defendant undertakes to pay, the plaintiff in his declaration must aver a performance or a readiness to perform on his part. But the want of such an averment must be taken advantage of by demurrer; or, if the judgment be by default, by motion in arrest.—*Justice v. The Board of Justices of Vermillion County.*

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2. The plaintiff, in such an action, can not be obliged to prove performance of his part of the contract before he has proved the existence of the contract itself.

Ibid.

3. In the case of a special contract, one party can not, by a part performance only of his part, sue for and recover, in indebitatus assumpsit, for the part he has performed. But if he perform a part of what he was to do, and be prevented from performing the residue by the conduct of the other party, he may abandon the contract and recover for what he has done.—*Hoagland et al v. Moore*167

CONFUSION OF GOODS.

It is a rule, both at law and in equity, that if a person having charge of the property of another, so confounds it with his own that it can not be distinguished, he must bear all the inconvenience of the confusion; and, if it be a case of damages, the damages given against him will be to the utmost value of the property.—*Brackenridge v. Holland et al*377

CONSIDERATION.

See CHANCERY, 33; COMPANY, UNINCORPORATED; COVENANT, 7; EXECUTORS AND ADMINISTRATORS, 4; PLEADING, 14; PROMISSORY NOTES, 4; VENDOR AND PURCHASER, 3, 21.

CONSTABLE.

See EXECUTION, 2.

1. Although in a justice's warrant for the apprehension of an offender, the time when the offence is alleged to have been committed be subsequent to the date of the warrant, the constable is justifiable in executing it.—*Patterson v. Kise et al.*

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2. If the defendant, in pleading a warrant in justification of an arrest, aver that he was an acting deputized constable of the county, the word *deputized* may be considered as surplusage; and the plea will be good, though it do not set out the defendant's appointment, nor allege that the warrant was shown to the plaintiff, nor that it was returned*Ibid.*

3. Though two offences against the party be charged in the warrant, yet, if the justice has jurisdiction over both, the constable is bound to execute it.....*Ibid.*
4. A person acting as a special constable to execute a warrant, is authorized to command assistance in case of opposition.....*Ibid.*

CONSTITUTIONAL LAW.

See DIVORCE, 2; INSOLVENT LAWS; EFFECT OF DISCHARGES UNDER, 3, 4; JUDGMENT, 2-5; JUSTICE OF THE PEACE, 2; MILITIA FINES; SLANDER, 1; STATUTE, 1.

CONSTRUCTION OF STATUTES.

See STATUTE, 5.

CONTEMPT.

See CHANCERY, 8, 9; TRESPASS, 4.

CONTINUANCE.

See AMENDMENT.

1. If the continuance of a cause be applied for, on the ground that a witness who had been subpoenaed does not attend, the return of the sheriff must be produced.—*Gordon v. Spencer*286
2. An affidavit for a continuance, on account of the absence of witnesses, must clearly show their materiality. *Ibid*

CONTRACT.

See CONDITION PRECEDENT; VENDOR AND PURCHASER, 13.

A person entered into possession of real estate under a parol contract, by which the lessee was to have a written lease for the premises for 7 years, and was to make certain improvements thereon. After a part of the work had been done, and long before the expiration of the term, the lessor refused to execute the lease, and obliged the lessee to quit the premises. *Held*, that the lessor, having rescinded the special contract, was liable to the lessee, in indebitatus assumpsit, for the work performed.—*Alcorn v. Harmonson*235

CONVEYANCE.

See FRAUDULENT CONVEYANCE; VENDOR AND PURCHASER, 9, 14, 24-27, 30; WITNESS, 4.

If a conveyance of real estate appears on its face to have been regularly executed, and its execution is attested by subscribing witnesses, it is admissible in evidence without a certificate of acknowledgement; an acknowledgement being essential to the admission of a deed to record, but not to its validity.—*Doe d. Wayman v. Naylor*.....32

CORPORATION.

See BANK OF INDIANA, FARMERS AND MECHANICS' COMPANY, UNINCORPORATED.

1. A plea in abatement to an action by a corporation, that the charter is forfeited in consequence of a misuser or non-user of the franchises, can not be good; unless it show the forfeiture to have been judicially declared at the instance of the government.—*John et al. v. The Farmers and Mechanics' Bank of Indiana*.....367
2. If a promissory note be given to a company as a corporation, the maker is estopped from contending that, at the date of the note, the company was not a corporation. *Ibid.*

COSTS.

See BOND, 10, 11; CHANCERY, 2; EJECMENT, 5; REPLEVIN, 4.

1. The defendant in replevin avowed the taking of the goods, by virtue of his office as sheriff, on an execution against a third person to whom they belonged. The plaintiff pleaded property in himself. The jury found that some of the goods were the plaintiff's, and that some were not his. Judgment on the verdict, and that each party should recover his costs. *Held*, that, as each party had succeeded, each was entitled to costs; and that the judgment was right.—*Chinn v. Russell*.....171
2. If the jury find a defendant in an indictment guilty and assess the fine, but acquit him as to costs, no judgment for costs can be rendered against him.—*The State v. Rackley*. 249
3. Neither the state, nor a county, is bound by law to pay the fees and charges of the officers, in cases of prosecutions on behalf of the state, in which the prosecution fails.—*Rawley v. The Board of Commission-*

- ers of Vigo County*355
4. A. brought an action against B., before a justice of the peace, for 77 dollars, and obtained a judgment for 5 dollars and his costs. A. appealed to the Circuit Court, and obtained a judgment for the same amount with costs. *Held*, that, under the statute of 1827, the judgment in the Circuit Court for costs was not erroneous.—*Roberts v. Le-favour*358
5. The costs on the appeal are taxed, under the statute of 1827, in such a manner as the Court thinks proper.*Ibid.*

COUNTY.

See COSTS, 3.

COUNTY COMMISSIONERS.

See PARTIES, 1, 2.

COUNTY SEMINARIES.

See MILITIA FINES, 2.

COURT.

See JURY, 7.

1. The Court can not give an unqualified charge to the jury, that the evidence is insufficient to support the action, unless in cases where it would be bound to set aside the verdict if for the plaintiff.—*The Governor v. Shelby*26
2. The refusal of the Court to give instructions to the jury, which are good law but not applicable to the case, can not be assigned for error.—*Rapp v. Grayson*130
3. Whether evidence be competent or not is always a question for the decision of the Court.—*Townsend v. The State*151

COVENANT.

See FORMER RECOVERY, 2, 4; RE-LEASE; VENDOR AND PURCHASER, 14, 18-20.

1. If the breach of contract, for which an action of covenant is brought, was accompanied with fraud, the fraud is a proper subject of inquiry in that action, and may be specially averred in the declaration.—*Cutler v. Cor.*.....178
2. A., being the owner in fee of a

town, leased one of the houses to B. for a term of years, and covenanted in the lease that B. should have the exclusive privilege of vending merchandise in the town during the term. Soon after the commencement of that term, A. leased another house in the town to C. for a term of years, without any restriction as to the vending of merchandise there; C. under-let a part of this house to D. without restriction; and D. commenced the sale of merchandise on the premises so leased to him. D., before the date of his lease, had notice of A.'s covenant with B., and C. had notice of the same before D.'s sale had commenced. *Held*, that D. was not, under these circumstances, prohibited from vending merchandise in the part of the house which had been leased to him by C.—*Taylor v. Owen et al.*.....301

3. Such covenants as that above mentioned, of A. with B., are merely of a personal nature. They neither run with the land of the covenantor, nor create any lien thereon, either legal or equitable.....*Ibid.*
4. A *bona fide* vendee or lessee of real estate is not affected by such a personal covenant; and the circumstances of his having had notice of it makes no difference.....*Ibid.*
5. A., by his unrestricted lease to C., above mentioned, broke his covenant with B.; and he is liable for the breach to B., if the covenant be valid, in an action at law..... *Ibid.*
6. Same points decided as in the last-named case.—*Taylor v. Moffatt et al*304
7. The consideration of a title-bond was—the obligee's agreement to convey certain land to the obligor, on the same day on which the conveyance mentioned in the title-bond was to be executed, and to pay the obligor two promissory notes before that day, one in money and the other in personal property. *Held*, that the covenants were dependent; and that the obligee's not conveying nor offering to convey the land, the conveyance of which was the main part of the consideration of the title-bond, was a bar to his recovery on that bond.—*Pence et al. v. Smock*.....315.

D

DAMAGES.

See BOND, 6, 9; DEMURRER TO EVIDENCE, 3; SEAT OF JUSTICE, 3; TROVER, 1; VENDOR AND PURCHASER, 20.

1. If the sum to which the plaintiff is entitled depend on the amount due on a judgment, the Court can assess the damages, after judgment for the plaintiff on demurrer, without a jury; and so wherever there are records or other undisputed documents to determine the amount due.—*Harrington v. Witherow*37
2. On a covenant to convey real estate, as on a covenant of seisin, the measure of damages is, in the absence of fraud, the purchase-money and interest. — *Blackwell v. The Board of Justices of Lawrence County*.
143
3. *Quere*, whether on the covenant of warranty, the value of the land at the time of eviction, or the purchase-money with interest, is the measure of damages*Ibid*.
4. Debt on a bond, and judgment by default. The plaintiff suggested that the bond was conditioned for the delivery of property taken on execution, and assigned as a breach that the condition was broken. Judgment, without a jury, for the amount of the execution. *Held*, that supposing the assignment of the breach to be only informal, and the want of a judgment for the penalty to be unavailing in error, yet the breach should have been found, and the damages assessed, by a jury.—*Perkins et al. v. Smith*171
5. Debt on a bond for the delivery of goods, taken on an execution which had issued against a judgment-debtor and his replevin-surety. Judgment, on demurrer, for the plaintiff. *Held*, that the measure of damages, if they did not exceed the penalty of the bond, was the amount due on the original judgment, with interest and costs; but that the assessment could not exceed the penalty.—*M' Coy et al. v. Elder*183
6. Debt on an attachment-bond. The condition of the bond was set out in the declaration. *Held*, that, on the assessment of damages, the demurrer being overruled, evidence

of the plaintiff's having paid a fee to an attorney, in the attachment-suit, was admissible.—*Morris et al. v. Price*457

7. *Held*, also, that on overruling the demurrer in such case, final judgment should be stayed until the truth of the breaches assigned are inquired into and the damages assessed; and that, after such assessment, final judgment should be rendered for the debt in the declaration mentioned with costs, and execution awarded for the damages assessed with costs.....*Ibid*.

DAYS OF GRACE.

See BANK OF INDIANA, FARMERS AND MECHANICS'.

DEBT.

See DECREE.

1. The general doctrine is, that an action of debt can not be sustained on a decree in chancery.—*Elliott et al v. Ray*31
2. An action of debt will not lie on the decree of a Court of chancery in another state, unless the decree have, by the statute of that state, the force and effect of a judgment at law*Ibid*.
3. If the decree have such effect by statute, that fact should be averred and proved; the statutes of other states not being noticed here without proof.....*Ibid*.

DEED.

See CONVEYANCE.

DELIVERY-BOND.

See BOND, 2, 3, 6; DAMAGES, 4, 5.

DEMAND.

See BOND, 2; DISSEISIN, 4; SHERIFF, 5, 8; VENDOR AND PURCHASER, 4, 7, 8, 18.

DEMAND, STATEMENT OF.

See JUSTICE OF THE PEACE, 5.

DEMURRER.

See PLEADING, 2.

The defendant, on a demurrer to his plea, obtained a judgment. without having joined in demurrer. *Held*, that the plaintiff could not assign

the want of the joinder for error.—
Harris v. M'Faddin.....71

DEMURRER TO EVIDENCE.

1. A party does not, by cross examining his opponent's witness, preclude himself from the right of demurring to the evidence.—
M'Creary v. Fike374
2. If a demurrer to parol evidence contain all the evidence given, a joinder in demurrer may be demanded.....*Ibid.*
3. When a demurrer to evidence is allowed, the jury may assess the damages conditionally; or they may be discharged without making such an assessment; in the latter case, should the demurrer be overruled, the damages may be assessed by another jury on a writ of inquiry.....*Ibid.*
4. If, from the testimony set out in a demurrer to the plaintiff's evidence, the jury might have inferred that the action should be sustained, the plaintiff is entitled to a judgment in his favor*Ibid.*

DEVASTAVIT.

See EXECUTORS AND ADMINISTRATORS, 1, 16, 17.

DEVISE.

See WILL.

DILIGENCE.

See BOND, 4; PLEADING, 3; PROMISSORY NOTES, 3.

DISSEISIN.

1. A. died in possession of a tract of land, which he held by virtue of a title-bond executed by C. The widow of A. remained in possession and married B., who also continued in possession. C., having the legal title, brought an action of disseisin for the premises against B. without having previously demanded the possession.
Held, that though the statute gives to the widow of A. a right of dower in the equitable estate, her claim constituted no defence in law to the action of disseisin brought by C.—*Taylor v. M'Crackin*260
2. *Held*, 2d, that the statutory provision—authorizing the widow to continue in possession of the mansion-

house, and the messuage thereto belonging, until her dower is assigned—applies only to the persons claiming under her deceased husband, and not to those claiming by an adverse title.....*Ibid.*

3. *Held*, 3d, that though a judgment, in the action of disseisin, settles the titles held by the parties at the time of its rendition, it does not prevent the losing party from enforcing a superior title subsequently acquired, nor preclude either of the parties from applying to a Court of chancery to perfect his title, or to enjoin a judgment obtained contrary to equity*Ibid.*
4. *Held*, 4th, that C. could not sustain his action of disseisin against B., under the circumstances of this case, without having previously demanded of him the possession of the premises.....*Ibid.*

DISTRESS.

See REPLEVIN, 4, 5, 7, 9.

1. The warrant of a justice of the peace, issued under the statute of 1824, commanding the constable to distrain for rent, is a justification to the officer in an action of replevin by the tenant, independently of the landlord's claim.—
Harris v. M'Faddin.....71
2. If the constable justify under his warrant, and obtain judgment on a demurrer to his plea, he is entitled to a return of the goods..*Ibid.*
3. If the tenant wish to contest the landlord's right to distrain—to rely, for example, on *non tenuit* or *riens in arrear*—he should institute his suit against the landlord...*Ibid.*

DIVORCE.

See ALIMONY; FRAUDULENT CONVEYANCE, 3; VENDOR AND PURCHASER, 24.

1. Petition by a wife for a divorce. The marriage was solemnized in Kentucky, where the parties then resided. The husband there, in 1822 or 1823, deserted his wife, and has ever since lived in adultery with another woman. Two or three years after the desertion, the wife removed to this state, where she has since that time resided. The husband was never resident here; and the notice to him of the pen-

- dency of this suit was by publication. *Held*, that the Circuit Court, under the statute, has jurisdiction of the cause.—*Tolen v. Tolen*.....407
2. The constitutional provision, prohibiting laws impairing the obligation of contracts, does not extend to general laws authorizing divorces; provided the legislature, in the exercise of its power, does not pass beyond the rights of its own citizens, and act upon the rights of the citizens of other states. *Ibid*.
 3. In a suit for a divorce, the *lex domicilii* is the rule of decision..*Ibid*.

DOWER.

See DISSEISIN, 1, 2, 4.

1. After the alienation of real estate, and before the death of the grantor, the value of the estate was greatly enhanced by improvements made by the grantee. *Held*, that the dower of the grantor's widow should be assigned according to the value of the property at the time of the alienation.—*Wilson v. Oatman*.. 223
2. A title-bond, conditioned for the conveyance of real estate on payment of the purchase-money, was executed, and possession at the same time given to the obligee. The purchase-money was afterwards paid, and a title obtained by the purchaser. *Held*, that the date of the bond must be considered the period of alienation, in estimating the value of the property with a view to the dower of the obligor's widow*Ibid*.

DUPLICITY.

See PLEADING, 4, 8, 20, 21.

E

EJECTMENT.

1. If a defendant in ejectment have a legal title to the premises, and neglect to produce it in that action, he can not, after a verdict against him, obtain an injunction of the proceedings at law, by a bill in chancery founded on the same title. —*Brown v. Wyncoop*..... 230
2. The question, whether a deed be fraudulent and void as to creditors, may be examined and decided in an action of ejectment.....*Ibid*.
3. An infant, having a title to land

for which an action of ejectment is brought, has a right to be admitted a defendant on the usual terms; and the Court should appoint a guardian for him, in order that he may be enabled to defend the suit.

- Glass v. Doe d. Murphy*.....293
4. A person claiming, by virtue of a title-bond only, the premises for which an action of ejectment was brought, applied to be made a defendant in the cause. *Held*, that, as the claim was merely of an equitable nature, the application could not be granted.—*Rench v. Doe d. Webster*309
 5. If, in ejectment, there be a verdict and judgment for the defendant, the judgment for costs must be entered against the nominal plaintiff, and not against the lessor.—*Doe d. Brown et al. v. Owen*.....452
 6. But a judgment in such case, against the lessor, being defective only in form, may be amended on motion in the Court below. Even after the cause is removed by writ of error, the proceedings in the Supreme Court will be stayed, on motion, till the amendment can be made; and, after the amendment, a new transcript may be obtained, on suggestion of diminution, and the judgment affirmed.....*Ibid*.

ERASURE.

See CHANCERY, 11.

ERROR.

See DEMURRER; INQUIRY, WRIT OF, 2; JURY, 3, 13; OYER, 3; PLEADING, 16, 17; SEMILITER.

1. The record showed that a suit had been commenced in the Orange Circuit Court, and that a declaration and plea had been therein filed; that the declaration and plea, with an affidavit for a change of venue, were afterwards on file in the Washington Circuit Court; that the cause was tried, and a verdict rendered for the plaintiff, a new trial granted on the defendant's motion, a second verdict and final judgment rendered for the plaintiff, in the last-named Court. *Held*, that the circumstance of the record's not showing an order for a change of venue, could not be assigned for error, no objection having been

- made below to the jurisdiction of the Washington Circuit Court.—*Bosley v. Farquar et al.*.....61
2. If the evidence, relative to the merits of the action, be contradictory, and the jury have any grounds for their verdict in favor of the plaintiff, a court of errors will not reverse a judgment on the verdict, because a new trial had been refused. *Aliter*, if there was no evidence of a fact essential to the support of the action.—*Rapp v. Grayson*.....130
3. A judgment will not be reversed because a motion for a new trial, made on the ground of the verdict's being contrary to evidence, has been overruled; unless it be clear that the verdict is not warranted by the evidence.—*Lambert v. Sanford*.....137
4. A judgment against a defendant, in a criminal cause, will not be reversed because the record does not show that the indictment was endorsed, "a true bill," by the foreman of the grand jury.—*Townsend v. The State*.....151
5. If any of the evidence, which is contradictory, conduce to prove the plaintiff's case, and he obtain a verdict, the refusal to grant to the defendant a new trial, on account of the insufficiency of the evidence, will not, except in extreme cases, be available in error. And where a new trial is applied for on account of excessive damages, and refused, the damages must be outrageously excessive, or a Court of error will not interfere.—*Hoagland et al. v. Moore*.....167
6. It is always presumed by the Supreme Court, that all the evidence necessary to sustain the verdict was given to the jury, unless the contrary be shown by the record.—*Chaper v. Adams et al.*.....294
7. If the facts relied on to reverse a judgment be not shown by the record, and the judgment would be authorized by any facts which might have been legally before the Court, the judgment must be affirmed. —*Blum v. Findley et al.*.....338
8. After a cause had been continued, the parties appeared during the same term and proceeded to trial. This was held not to be erroneous. The proceeding to trial, which must be presumed to have been by consent, cancelled the previous order of continuance.—*Wilson v. Coles*.....402
9. If a motion for a new trial, made on the ground that the verdict is unsupported by the evidence, be overruled, and the opinion be excepted to—the bill of exceptions must show that it contains all the evidence given in the cause.—*Lurton v. Carson*.....464
10. If the evidence be contradictory, and there be ground for an honest difference of opinion as to the propriety of the verdict, the refusal to grant a new trial is not error.—*Ibid.*

ESCAPE.

1. A ca. sa. on a replevin-bond in the Supreme Court was, by the sheriff thereof to whom it was directed, sent to the sheriff of Jackson county, where the execution-defendant resided. The sheriff of that county arrested the defendant, and afterwards suffered him to escape. *Held*, that, under the statute, the sheriff of the Supreme Court was not liable for the escape.—*M'Gruder v. Russell*.....18
2. The sheriff of Jackson county, after the escape, retook the defendant in that county, and brought him to the seat of government, where the Supreme Court sits. *Held*, that the removal of the defendant out of the county in which he was arrested was an escape. *Ibid.*
3. A capias ad respondendum was issued against Taylor & Searles requiring bail. Upon this writ the sheriff arrested David S. Taylor, but took no bail and permitted him to escape. *Held*, that the sheriff committed no breach of duty in this discharge of Taylor, although the person intended by the name of Taylor in the writ was David S. Taylor.—*The Governor v. Stribling et al.*.....224

ESTOPPEL.

See CORPORATION, 2; FORMER RECOVERY, 5.

EVIDENCE.

See BOND, 3, 5, 8; CHANCERY, 14-21, 30; CONVEYANCE; COURT, 3; DE-

MURDER TO EVIDENCE; FORMER RECOVERY, 5; FRAUDULENT CONVEYANCE, 2; JUSTICE OF THE PEACE, 4, 7; MALICIOUS PROSECUTION, 2-4; MARRIAGE; PARTNERSHIP, 4, 6-8; PLEADING, 14; SHERIFF, 3; SLANDER, 4, 6; SURETY, 2, 3; TRUST AND TRUSTEE, 1-3, 7, 8, 11; VENDOR AND PURCHASER, 9, 23, 28, 31; WITNESS.

1. The answer of one defendant in chancery is no evidence against his co-defendant.—*Thomasson v. Tucker's Administrators*.....172
2. Held, that an entry in the partnership books, by one of the partners in the business of a saw-mill, charging himself with a boat which he had built at the mill—might be introduced by him as evidence, *inter alia*, to prove the boat to be his individual property.—*Reno v. Crane* 217
3. A. entered into partnership with B. in the business of tanning; and C. bound himself in a covenant to B. for A.'s conduct as a partner for a certain time. Held, that in an action by B. against C. on the covenant, the admissions of A., made after the expiration of the stipulated time, were not admissible as evidence against C.—*Hotchkiss v. Lyon et al*222
4. It is a general rule, that the best evidence must be given of which the nature of the case is capable.—*Jackson d. Taylor v. Culbom*228
5. If any instrument of writing, or even the record of a judgment, be lost or destroyed, the contents may be proved by parol evidence.—*Ibid.*
6. K. and D. being partners in a mill which they had built, entered into a written agreement, stating, *inter alia*, that D. had bought K.'s interest in the mill for 500 dollars, to be paid in certain installments. K., in an action against D. for the purchase-money, was permitted to show by parol evidence, that the sum of 500 dollars, which D. was to pay K. for his interest in the mill, was exclusive of the expenses that had been incurred in building it; and that those expenses were to be paid by D.—*Kelsey v. Dickson*236
7. D. had given to K. a receipt as follows: "Rec'd. 17th Oct. 1821, of J. Kelsey, 250 dollars, which,

with 100 dollars formerly rec'd., (as per rec't. given Mr. K.,) I am to lay out for him in Louisville, in such goods as will suit the Terre Haute market, charging him cost and carriage; or, should this mode of settlement not be desired, I am to pay the amount in specie, adding a premium of two per cent.—say in all 357 dollars, with interest from date until paid—Francis Dickson, Jun." In an action by K. against D., in which K. claimed the whole amount named in this receipt, it was held that, though the original receipt for 100 dollars was not produced nor its absence accounted for, that circumstance was not of itself sufficient to exclude K. from the benefit of the receipt for the whole amount, including the 100 dollars acknowledged to have been previously received.—*Ibid.*

8. Neither hearsay nor irrelevant testimony is admissible.—*Wilson v. Harding*241
9. A sheriff's acknowledgment that he had collected money on an order of sale, can not be proved to sustain an action for the money against the sheriff's surety, unless the acknowledgment was made whilst the sheriff was acting officially in relation to the receipt of the money.—*Shelby v. The Governor*.
289
10. A party is not permitted to prove what one of his witnesses swore to on a former trial of the cause, until he has proved that the witness is dead.—*Hobson v. Doe d. Harper*.
308
11. A paper, purporting to be an affidavit made before a justice of the peace in another county, was offered in evidence. Held, that there must be proof of its authenticity in order to authorize its admission; but that it might be proved by parol evidence.—*Hagaman v. Stafford*351
12. If the defendant believes the plaintiff's evidence insufficient to sustain the action, he should obtain the decision of the Circuit Court on the subject, by asking instructions to the jury, by a motion for a new trial, or in some other way. Without some such previous proceeding, though the evidence be set out in a bill of exceptions, the Supreme

- Court can take no notice of the question.—*Sims et al v. Givan*...461
13. If, in the course of a witness's examination, he appears from his own answers to be incompetent, the party against whom the evidence is given, should move to strike out the testimony. But, if no objection be made below to the evidence, its admission can not be assigned for error.....*Ibid.*

EXCEPTIONS.

See CHANCERY, 13, 14, 27.

EXECUTION.

See CHANCERY, 31; DAMAGES, 5; REPLEVIN, 2, 3; RIGHT OF PROPERTY; TRIAL OF; SHERIFF, 3-6, 8; TRUST AND TRUSTEE, 6; VENDOR AND PURCHASER, 1, 2, 4-8, 15, 22, 23, 25, 28, 29, 33, 34.

1. An execution commanding the sheriff that of the goods of A., B., and C., he make, &c., which D. had recovered against the said A. and others, is not objectionable for not stating the recovery to have been against the said defendants A., B., and C.; the expressions being substantially the same.—*M'Coy et al v. Elder*183
2. A constable is virtually within the provisions of the statute, requiring sheriffs to pay rent before the removal of goods taken in execution on demised premises; and when sued for improperly paying rent, he is bound to give some evidence that the rent was due.—*Ungles v. Graves*191
3. A fieri facias, by statute expressly commands the sheriff to make the money of the goods and chattles, lands and tenements of the debtor.—*Frakes v. Brown*.....295
4. A note for the payment of money can not be taken and sold on execution.—*M'Clelland v. Hubbard*.361

EXECUTORS AND ADMINISTRATORS.

See JUSTICE OF THE PEACE, 8; SURETY, 2, 3.

1. If a devastavit be established against an administrator, his sureties can not afterwards convert the devastavit.—*The Governor v. Shelby*26
2. If the plaintiff name himself as

administrator, in a suit on a judgment recovered in his own name on promises made to himself, no proof of the letters of administration is necessary: the word administrator may be considered as surplusage, or as a descriptio personæ.—*Capp v. Gilman*.....45

3. The declaration, in such a case, may be in the debet and detinet. *Ibid.*

4. A bill was drawn on an administrator payable out of a particular fund. The administrator promised the holder that if he would retain the bill, it should be paid whenever a certain farm should be sold. *Held*, that as the consideration of this promise arose subsequently to the intestate's death, no action would lie against the administrator on the promise, so as to charge the estate of the intestate.—*Mills et al. v. Kuykendall*.....47

5. The promise of an administrator, to pay a debt of the intestate, need not be averred in the declaration to be in writing; the statute of frauds applying to the proof and not to the declaration.....*Ibid.*

6. The statute requiring executors and administrators to give bond with surety imposes on them no new duties; but it gives an additional remedy to creditors, legatees and persons entitled to distribution.—*Eaton v. Benefield et al*.....52

7. A creditor can not sue on an administration-bond until after he has obtained judgment against the estate of the intestate.....*Ibid.*

8. A legatee, distributee, or creditor, until his claim has been exhibited and established according to law, and the payment thereof has been refused by the executor or administrator, is not a party injured within the meaning of the statute, and can have no suit for his benefit on the executor's or administrator's bond.....*Ibid.*

9. The declaration on a bond of an executor or administrator must show the relator to be a creditor, legatee, or distributee*Ibid.*

10. An account, commencing "A. B. debtor to C. D.," and then setting out the items, dates, sums, &c., was filed in the Circuit Court upon the application of an executor, under the statute of 1824. *Held*, that the

- account was sufficiently particular. —*Sackett v. Wilson*85
11. Assumpsit against an administrator on promises of the intestate. Pleas, non-assumpsit, the statute of limitations, and plene administravit. Judgment against the defendant *de bonis propriis*. Held, that as neither of the pleas was false within the defendant's knowledge, the judgment *de bonis propriis* was erroneous; but as this was only a clerical mistake, time would probably be given for its amendment below, were there no other error in the case.—*King v. Anthony*131
12. In an action against an administrator, if, on the pleas of non-assumpsit and plene administravit, the jury find for the plaintiff, they should also find the amount of the assets in the defendant's hands, unadministered*Ibid*.
13. Letters testamentary or of administration, granted in another state, will not authorize the executor or administrator to commence a suit in this state, unless the letters be previously recorded in the Circuit Court of the county in which the suit is commenced.—*Naylor v. Moody et al*247
14. In an action by an administrator *de bonis non*, the declaration should state the name of the first administrator, and contain an averment of non-payment to him.—*Vanblaricum et al. v. Yeo*322
15. The settlement of an administrator's accounts in the Probate Court is, *prima facie*, correct; and a Court of chancery will not interfere with it, except in clear cases of mistake or fraud.—*Allen v. Clark et al* ...343
16. If an administrator suffer judgment by default, he can not afterwards, by the common law, in an action against him suggesting a devastavit, plead plene administravit. *Moore v. Martindale*.....353
17. The statute of 1822, authorizing, under those circumstances, the plea of plene administravit, does not affect cases in which the judgment by default was suffered previously to the statute.....*Ibid*.
18. The jurisdiction of a Court of chancery extends to the accounts of administrators, though settled in the Probate Court, if there be evidently a mistake or fraud in the settlement.—*Brackenridge v. Holland et al*377
19. If an administrator, authorized by an order of Court to sell, at public sale, the real estate of his intestate for the payment of debts, purchase the land himself at the sale, and, afterwards, sell the same at an advanced price, he is liable to account for the profits to the heirs, for whose benefit the administrator's purchase must be considered to have been made. And the effect is the same, whether the purchase be made by the administrator alone or jointly with another; or whether it be made in person or by an agent*Ibid*.
20. If, owing to the conduct of the administrator, any uncertainty exist as to the amount of the profits made by him on the purchase, he will be chargeable with the largest amount which, from the circumstances, he can be presumed to have realized*Ibid*.
21. Debt by A. against B., administrator of C., on a bond of the intestate for 860 dollars. Damage, 100 dollars. Pleas, *non est factum* and *plene administravit*. Verdict for the debt, and for 481 dollars and 60 cents damages; in all 1,341 dollars and 60 cents. Judgment for the same, *de bonis propriis*, with costs. Held, that the judgment is erroneous: 1st, because it is *de bonis propriis*; and, 2d, because it is for a greater sum than is laid in the declaration. —*Johnson v. Hawkins*459
22. Held, also that the jury should have not only found the amount of the debt and damages, but also the amount of assets in the defendant's hands*Ibid*.

F

FAILURE OF CONSIDERATION

See CHANCERY, 33; PLEADING, 6, 14.

FALSE IMPRISONMENT.

See TRESPASS.

FALSE RETURN

See SHERIFF, 3-6.

FEME COVERT.

If a wife commit an indictable of-

fence, without the presence or coercion of her husband, she alone is responsible for the offence.—*Penny-baker v. The State*.....484

FIERI FACIAS.

See EXECUTION, 3.

FORCIBLE ENTRY AND DETAINER.

1. The complainant, in an action of forcible entry and detainer, stated that the defendant with force and arms unlawfully and forcibly entered upon the plaintiff's land (particularly described), and him the plaintiff with force and arms did expel and unlawfully put out of possession: *Held*, that this complaint could not be objected to after verdict, for not showing more particularly that the plaintiff had peaceable possession of the premises before the injury complained of.—*Test v. Devers*.....80
2. The verdict in the Circuit Court for the plaintiff, on appeal, in a case of forcible entry and detainer, must, as on the trial before the justices, be signed by all the jurors. *Ibid.*
3. A. removed from a house and lot, leaving a few articles in the house and on the lot, and fastened the door. In the night of the second day afterwards—the door being proved to have been still fast on the evening of that day—B. entered into the house and put a tenant in possession, directing him to prevent every person, and A. particularly, from taking possession, and threatening to beat and prosecute any one who should enter on the premises. There was no direct proof, however, that B. broke open the door. On the complaint of A. against B. for a forcible entry and detainer, *held*, that the evidence would justify a finding against the defendant as to the forcible entry, and that it was clear against him as to the forcible detainer, which, under the statute, entitled the plaintiff to restitution.—*Evill v. Conwell*. 133

FORMER RECOVERY.

1. If a plea of former recovery contain sufficient matter to show that the causes of action in the two suits

are the same, and that the merits were determined in the first case, the plea is good; and it is not essential to the validity of the plea that the forms of the two actions be the same.—*Cutler v. Cox*.....178

2. A plea of former recovery to an action on the case founded on tort, can not be objected to merely because the first action was covenant; the causes of action appearing to be the same.....*Ibid.*
3. If a plea of former recovery aver the causes of action to be the same, and the record do not show them to be different, the averment, on a demurrer to the plea, must be taken as true.....*Ibid.*
4. To an action of covenant for not furnishing such a boat as is required by a contract under seal, accord and satisfaction may be pleaded in bar; and if, on the trial of an issue to a replication denying the plea, there be a verdict and judgment for the defendant, the merits of the case are settled, and the judgment is a bar to any future action, though founded on tort, for the same cause.....*Ibid.*
5. To render a former recovery an estoppel to a subsequent suit, embracing the same matter in controversy with the first, the judgment must be specially pleaded as an estoppel. If it be not so pleaded, and the defendant rely on the general issue, the former judgment is admissible in evidence, but it is not a conclusive bar to the action: the jury may still find for the plaintiff, if they think him entitled to recover.—*Picquet v. M'Kay*.....465

FORNICATION.

See ADULTERY; SLANDER, 2.

FRAUD.

See CHANCERY, 31; COVENANT, 1; JUDGMENT, 4; PLEADING, 19; TRESPASS ON THE CASE, 2; VENDOR AND PURCHASER, 10, 11.

FRAUDS, STATUTE OF.

See EXECUTORS AND ADMINISTRATORS, 5; TRUST AND TRUSTEE, 2; VENDOR AND PURCHASER, 34.

A. and B. purchased jointly a land-office certificate for a tract of land, on which there were some improve-

ments, and the assignment of the certificate was made to A., who had paid more of the purchase-money than B. The purchasers, by a parol agreement, divided the land. By this agreement, A. received several acres more than B., together with the improved part of the premises, and was to pay B. a certain sum as the difference in value of the two parts, and to assist B. in improving his part. Each of the parties took possession of his own part of the premises. *Held*, that the agreement was not affected, in equity, by the statute of frauds.—*Green et al v. Vardiman et al*324

FRAUDULENT CONVEYANCE.

See EJECTMENT, 2; LIS PENDENS; VENDOR AND PURCHASER, 25.

1. The heirs of A. filed a bill in chancery against the administratrix and heirs of B. The bill states that B., deceased, was the administrator of the estate of the complainants' father; that he sold the property which came into his hands as administrator for a large amount, the most of which he converted to his own use; and that his estate is insolvent. It further states that B., in his life-time, conveyed a certain tract of land to his son, one of the defendants, for the purpose of defrauding the complainants. The prayer of the bill is, that a decree be rendered for the amount of the complainants' claim, and that the land so fraudulently conveyed be sold to satisfy the same. The bill was taken *pro confesso*.

The Court, on examination of the bill, allegations, and proofs, decreed that the defendants should pay to the complainants the sum of 491 dollars; and, if the same were not paid on service of a copy of the decree, the land should be sold, &c.—*Sueny et al. v. Ferguson et al.*.....129

2. A. obtained judgment against B. on a note, and purchased, at the sheriff's sale under the judgment, a tract of land which B., after the date of the note and before the judgment, had conveyed to C. A. brought an action of ejectment for the land against C., and the question was, whether B.'s deed to C.

was fraudulent and void as to A. *Held*, that evidence of B.'s having stated, that the consideration of the deed to C. was a valuable one, was not admissible. *Held*, also, that the note on which the judgment was rendered was admissible to show the existence of the debt before the date of the deed.—*Doe d. Helm v. Newland*233

3. A wife has a lawful claim upon her husband for her maintenance; and if, during the pendency of her petition for a divorce and alimony, a conveyance of his land be executed by the husband in order to defraud his wife of her right to a support, and be received by the grantee with the same fraudulent design, the conveyance as to her is void.—*Frakes v. Brown*295
4. A deed, fraudulent as to a judgment-creditor, may be set aside at the suit of the purchaser at sheriff's sale under the judgment.—*Ibid*.
5. To render a deed fraudulent and void as to creditors, there must be fraud in the grantee as well as in the grantor.....*Ibid*.
6. A person indebted to several others and in insolvent circumstances, executed a conveyance of his real estate to his children, in consideration of a nominal sum and of natural love and affection, and with an intent to defraud his creditors. Two of the grantees were daughters and afterwards married. The grantor continued in possession, contracted other debts subsequently to the deed, and died insolvent. *Held*, that the conveyance was voluntary, and fraudulent and void as to the creditors of the grantor.—*O'Brien et al v. Coulter et al.*.....421

FRAUDULENT JUDGMENT.

- A person against whom suits were depending for *bona fide* debts, confessed a judgment in favor of another, without consideration, to defraud his creditors. The debtor's real estate was purchased, under an execution on this judgment, by the judgment-creditor. Judgments were afterwards obtained, by the *bona fide* creditors, in their respective suits, and executions issued thereon and returned "no property found." The Court, on a bill filed

by the *bona fide* creditors, set aside the fraudulent judgment, execution, and sale, and ordered the land to be sold to satisfy the complainants' demand.—*Bruner et al v. Manville et al*485

G.

GAMING.

See JURISDICTION, 3.

GUARDIAN AND WARD.

1. An infant, after his guardian's death, has a right to compel a settlement of his accounts as if he were of age; the guardian's trust being personal, and terminating at his death.—*Peck et al v. Braman et al*.....141
2. In the case of a guardianship until the ward is of full age, the general rule is, that the ward must be of age before he can require his guardian to account; yet, in chancery, a ward may, during his minority, call such a guardian to account, if any thing should occur which makes it necessary.....*Ibid.*
3. The guardianship of minors, and the adjustment of their accounts, form a conspicuous branch of chancery jurisdiction.....*Ibid.*

H.

HUSBAND AND WIFE.

See ABATEMENT, 3; ALIMONY; FEME COVERT; FRAUDULENT CONVEYANCE, 3.

I.

ILLEGITIMATE CHILDREN.

See BASTARDY.

INDEMNITY.

See SHERIFF, 4, 5.

INDICTMENT.

See COSTS, 2, 3; ERROR, 4; MALICIOUS TRESPASS; PERJURY, 2; RECEIVING STOLEN GOODS.

1. An indictment for an assault with intent to commit a felony, must show with certainty the particular felony intended to be committed.—*The State v. Hailstock*.....257
2. A common assault is not an indictable offence. It is punishable, however, by a justice of the peace..*Ibid.*
3. An indictment for retailing spiri-

tuous liquors to divers persons without license, is bad. It should either contain the names of the person to whom the sale was made, or state their names to be unknown.—*The State v. Stucky*.....289

INDORSEMENT.

See BOND, 1, 4, 5; PROMISSORY NOTES, 2-7.

INFANT.

See EJECTMENT, 3; GUARDIAN AND WARD.

INQUIRY, WRIT OF.

See BOND, 6, 9; DAMAGES, 1, 4-7.

1. The appearance of a defendant on the execution of a writ of inquiry, without objecting to the previous proceedings, cures any irregularities as to the time when the capias was executed or the declaration filed.—*White v. Rankin et al*.....78
2. The awarding of a writ of inquiry after the defendant's failure to appear on being called, without the previous entry of an interlocutory judgment, is a mere informality, and can not be assigned for error.
Ibid.

INSOLVENT LAWS, EFFECT OF DISCHARGES UNDER.

1. A debtor was discharged, under an insolvent law of Ohio, as to the imprisonment of his person, from a debt due to the payee on a promissory note. The parties resided in Ohio, and the debt was there contracted. *Held*, that the debtor might plead the discharge, so far as respected the imprisonment of his person, in bar of an action brought against him in this state on the note by an assignee thereof.—*Pugh v. Bussel*.....366
2. A., having become indebted to B. in the state of Ohio, where they both resided, gave his note to B. for the debt dated in 1821. In 1823, the parties being still resident in Ohio, A. took the benefit of the insolvent law of that state, and was discharged, so far as respected arrest and imprisonment, from all his debts, that of B. among the rest. Afterwards, A. removed to this state; and, to an action against him on the note, brought by C., the

- the assignee of B., he pleaded—in discharge of his person from arrest or imprisonment for the debt—his above-mentioned discharge in Ohio. *Held*, on general demurrer, that the plea was good.—*Pugh v. Bussell*...394
3. Until congress exercise the right of passing uniform laws on the subject of bankruptcy, any state may enact a bankrupt law not impairing the obligation of contracts....*Ibid*.
 4. A state law merely discharging the person of the debtor from imprisonment, not his after-acquired property, for debts contracted in the state between its citizens, is constitutional—whether the debt was contracted before or after the passage of the law. But, if the law discharges the debtor's after-acquired property as well as his person, a discharge under it is not valid unless the creditor make himself a party to the proceedings which lead to the discharge...*Ibid*.
 5. A discharge, by a state law, has no operation out of the state over contracts not made and to be carried into effect within the state; nor over the citizens of other states, who do not make themselves parties to the proceedings under the law*Ibid*.
 6. A discharge under an insolvent law, of the person and not of after-acquired property, may be pleaded in discharge of the person from imprisonment; and the judgment for the plaintiff, if the plea be supported, is, that he recover his debt, &c., to be levied not on the person of the defendant, but only on his property*Ibid*

INSTRUCTIONS TO JURY.

See COURT, 1, 2; INTEREST, 5; JURY, 3, 7.

1. If a new contract be made respecting money previously lent, and a new security be given, the interest should be calculated up to the time of the new contract and added to the principal; but this calculation is not to be made at every agreement for forbearance of payment where no change is made in the securities.—*Harvey v. Crawford et al*.....43
2. Whenever a sufficient payment is made, the interest must be first dis-

charged; but if the payment be less than the interest, the balance of the interest does not become principal*Ibid*

3. It is a general rule that interest is not allowable on the open, unliquidated accounts of merchants.—*Shewell v. Givan*312
4. Witnesses are not admissible to prove a custom of merchants in the city of another state allowing them to charge interest on their accounts, when the Courts of that state have refused to recognize the custom*Ibid*
5. Interest was charged by the plaintiff on an account for goods sold for which he sued. *Held*, that, all the evidence not being shown, he could not, in error, complain of the instructions to the jury, that they might allow interest or not, at their discretion.....*Ibid*

ISSUE.

See PLEADING, 13; PRACTICE, 2.

1. The issue on nul tiel record is for the Court, not for the jury to decide.—*Barker v. M'Clure*14
2. Issues on three pleas in bar to the whole cause of action. The first triable by the Court; the second and third by a jury. The second and third were tried and found for the plaintiff. *Held*, that the plaintiff could not have judgment until he had also succeeded on the first issue*Ibid*.
3. Two pleas in bar to the whole cause of action. An issue in law on one and of fact on the other. Verdict for the plaintiff. *Held*, that final judgment could not be rendered on the verdict, until the issue in law was disposed of.—*Riley et al. v. Harkness*34
4. Assumpsit on a promissory note. Two pleas. 1st, non-assumpsit and issue; 2d, as to part, a failure of consideration. Replication as to the second plea, demurrer and judgment for the plaintiff. *Held*, that, whilst the first issue was undisposed of, the plaintiff could not have final judgment for the amount of the note.—*Mitchell v. Sheldon et al*...185

J

JOINDER.

See DEMURRER: REPLEVIN, 3.

1. If the plaintiff, in an action against

- two, proceed to judgment against one alone, and the record do not contain a return of the writ that the other had not been found, and a suggestion of such a return, the judgment will be reversed on error. *King v. Anthony*.....131
2. If a suit be brought on a collector's bond against the principal and sureties, it is error to take judgment against the sureties alone, without a suggestion on the record of the sheriff's return to the writ of "non est inventus" as to the principal.—*Thompson et al. v. The Governor* 142

JUDGE.

See TRESPASS.

JUDGMENT.

See DISSEISIN, 3, EXECUTORS AND ADMINISTRATORS, 11, 15-18, 21. FRAUDULENT JUDGMENT; LIEN, 1; REPLEVIN, 7, 8.

1. A scire facias was issued by a justice of the peace in Ohio, on the transcript of a judgment of another justice there; and, on a return of the writ "not found," judgment was rendered for the plaintiff. On that judgment, an action was brought in a justice's Court of this state. *Held*, that the judgment, having been rendered without service of the writ, or the return of two nihilis, would not, on common law principles, support the action. *Held*, also, that if the judgment was authorized, by a statute of Ohio, on one return of "not found," the declaration should have shown that fact.—*Cone v. Cotton et al.*.....82
2. The constitution of the United States, requiring full faith and credit to be given in each state to the judicial proceedings of every other state, does not apply to a judgment which has been rendered without the defendant's having had legal notice of the suit.....*Ibid.*
3. The judgment of a Court of record of competent jurisdiction in one state, fairly obtained, where the defendant had personal notice of the suit, is conclusive between the parties in an action on it in any other state; and the circumstance that judgment is against the defendant as special bail, makes no difference.—*Holt v. Alloway*,108
4. To an action on the judgment of a Court in another state, the defendant may plead that the judgment was obtained by fraud, or that the Court had no jurisdiction of the person or of the subject-matter. *Ibid.*
5. A judgment obtained conformably to the laws of the state against a person resident therein, without personal notice of the suit, is not conclusive against him in an action on it in another state; nor is such judgment absolutely void as the judgment of a Court having no jurisdiction. The judgment, in such case, stands on the same footing with a foreign judgment; and if it be against special bail, he may, in an action on it in another state, plead that no ca. sa. had issued against his principal*Ibid.*
6. A judgment, after being replevied by the execution of a replevin-bond, was assigned. *Held*, that payment by the debtor on his replevin-sureties to the original judgment-creditor, before notice of the assignment, was valid.—*Gamble et al. v. Cummins*..... 235
7. If a debtor pay his judgment-creditor a sum equal to the amount of the judgment, and thereby cause the judgment to be assigned as a payment to another of his creditors, the transaction does not discharge the judgment, but the same continues valid in the hands of the assignee.—*Hawk v. Kimball et al.*309

JURISDICTION.

SEE CHANCERY, 4-6, 11, 25; DIVORCE, 1; EXECUTORS AND ADMINISTRATORS, 15, 18; GUARDIAN AND WARD, 3; JUDGMENT, 4, 5; JUSTICE OF THE PEACE, 1, 2, 8; SLANDER, 1; TRESPASS, 2-5.

1. In an action of debt before a justice of the peace, on a bond in the penalty of 175 dollars conditioned for the delivery of property, the plaintiff, in the statement of his demand, claimed 81 dollars and 25 cents; *Held*, that the justice had jurisdiction; the sum actually demanded not exceeding 100 dollars.—*Washburn et al. v. Payne*.....216
2. A justice of the peace, under the statute of 1827, has jurisdiction in actions of debt on penal bonds conditioned for the performance of covenants, when the penalty does

- not exceed 100 dollars.—*Evans et al. v. Shoemaker*..... 237
3. The winning of any sum of money, however small, at a game with cards, is an indictable offence of which the Circuit Court has exclusive jurisdiction.—*The State v. Albertson*251
4. Offences punishable by a fine not exceeding three dollars belong exclusively to the jurisdiction of justices of the peace. Other offences, punishable by a fine which may be more or less than three dollars according to circumstances, are cognizable only by the Circuit Court. *Ibid.*
5. Trespass de bonis asportatis. Plea, that the defendant, as a justice of the peace, had entered a fine against the plaintiff for an assault committed by him in the defendant's presence. *Held*, on demurrer, that the plea was bad, because it did not show but that the fine was imposed in the offender's absence.—*Logan v. Siggerson*266
6. A justice of the peace has jurisdiction of a cause commenced by notice and motion, if the notice set forth a claim, not exceeding 100 dollars, for which debt or assumption would lie.—*Cowgill v. Wooden* 332

JURY.

1. The circumstance that some of the grand jurors who had found an indictment, were above sixty years of age is no objection to the indictment.—*The State v. Miller*.....35
2. The statute of 1824 excuses persons above sixty years of age from serving on juries, if they choose to claim the privilege; but the party indicted can not object to them on that ground*Ibid.*
3. The jury, about to retire to consider of their verdict, were instructed by the Court, that should they agree before the meeting of the Court on the following day, they might seal up their verdict, disperse, and hand in their verdict on the next morning. The jury gave in their verdict on the next morning. *Held*, 1st, that as the record did not show the dispersion of the jury, no objection founded on their dispersion could be noticed on a writ of error; 2d, that as the in-

- struction was not objected to when given, the dispersion, were it shown could not be assigned for error. *Bosley v. Farquar et al.*16
4. If one of the petit jurors, summoned to try an indictment, was on the grand jury that found the bill, the defendant may challenge him. But he can not, on that ground, move for a new trial after a verdict of guilty, if he knew of the objection, and omitted to make it, when the jury was impaneled.—*Barlow v. The State*114
5. The affidavits of jurors may be received in support of their verdict, but not to impeach it.....*Ibid.*
6. If a juror, during the trial of a cause, converse with a by-stander, or leave the Court room, without consent of the Court, it is a misdemeanor for which he may be punished. But if the investigation of the cause was not interrupted, if nothing took place which could influence the juror, and if no attempt was made to tamper with him, the misconduct will not entitle the defendant to a new trial, after a verdict against him, even in a case of manslaughter*Ibid.*
7. The jury are the judges of the facts, both in civil and criminal cases; but they are not, in either, the judges of the law. They are bound to find the law as it is propounded to them by the Court. They may, indeed, find a general verdict, including both the law and the facts; but if, in such verdict, they find the law contrary to the instructions of the Court, they thereby violate their oath.—*Townsend v. The State*.....151
8. A party has the same right to a jury, in a cause commenced by notice and motion, that he has in other cases.—*Cowgill v. Wooden*..332
9. If the sheriff, a party in the cause, have summoned the jurors selected under the statute of 1827, the array may, for that reason, be challenged. *Ibid.*
10. A person under a prosecution for a capital offence about to be submitted to a grand jury, may challenge any of the grand jurors for cause, but not peremptorily.—*Jones v. The State*475
11. One of the grand jurors in such a case, in answer to a question put

- to him by the prosecuting attorney, said, "that he thought he could not in his conscience find any man guilty of an offence that would subject him to death." *Held*, that the juror was disqualified *Ibid*.
12. Challenges to petit jurors are first made by the prisoner, and afterwards by the prosecuting attorney *Ibid*.
13. The record in a capital case showed that, after the petit jury were sworn, the Court adjourned from one day to the next, but it did not show that the jury were legally disposed of during the adjournment. *Held*, that a verdict and judgment against the defendant must, under those circumstances be considered erroneous. *Ibid*.

JUSTICE OF THE PEACE.

- See INDICTMENT, 2; JUDGMENT, 1; JURISDICTION; OYER, 2; RECOGNIZANCE, 1, 2; SLANDER, 1; TRESPASS.
1. Indictment for an assault and battery. Plea, that before the commencement of the prosecution, the defendant had been arrested on the warrant of a justice of the peace of the county for the charge set forth in the indictment; and that, after a full examination of the case, the justice had acquitted him of the offence. *Held*, on demurrer, that the plea was a good bar to the prosecution.—*The State v. M'Cory*5
2. The statute, authorizing justices of the peace to punish trivial breaches of the peace by fine not exceeding three dollars, is not unconstitutional; and it is discretionary with the justice whether to try a charge of a breach of the peace himself, or to recognize the defendant to answer the same at the next term of the Circuit Court.....*Ibid*.
3. If satisfaction of a judgment be entered by a justice of the peace on his docket, he and his sureties are liable for the amount to the judgment-creditor; no matter for what consideration the satisfaction was entered, unless the creditor was a party to the arrangement.—*Modisett v. The Governor*.....135
4. On the docket of justice A., which, for some reason not shown, was in justice B.'s hands, there was a receipt purporting to be signed by B. of a judgment there entered: *Held*, that the receipt was not admissible as evidence against B., without proof of his having executed it. *Ibid*.
5. Debt before a justice of the peace on a bond in a penalty less than 100 dollars, conditioned for the performance of covenants. *Held*, that no statement of the demand, except the filing of the bond, is in such case necessary. *Held*, also, that no suggestion of breaches is required in such a case.—*Evans et al. v. Shoemaker*237
6. The statute of 1827 requires that, in justices' Courts, special matters of payment and set-off should be stated in writing; but, in other cases generally, special pleas are not necessary in those Courts.—*Cowgill v. Wooden*.....332
7. In a cause commenced in a justice's Court, the defendant may, without pleading the general issue, give any matters in evidence which, under that plea, are admissible in other Courts.....*Ibid*.
8. The jurisdiction of justices of the peace does not extend to cases in which an executor or administrator is either plaintiff or defendant.—*Simonds v. Colvert et al*413

L

LANDLORD AND TENANT.

- See CONTRACT; COVENANT, 2-6; DISTRESS; EXECUTION, 2.
1. The under lessee of real estate has a right to pursue thereon any lawful business he chooses, which is not prohibited by the lease to his lessor nor by that to himself; and which is not injurious to the premises.—*Taylor v. Owen et al*301
2. Same point decided.—*Taylor v. Moffatt et al*.....304

LEASE.

- See COVENANT, 2-6; LANDLORD AND TENANT.

LEX DOMICILII.

- See DIVORCE, 3.

LICENCE.

- See SPIRITUOUS LIQUORS, RETAILING OF.

LIEN.

See ALIMONY; COVENANT, 3; TROVER.
3; VENDOR AND PURCHASER, 16, 33,

1. The lien of a judgment is not extinguished by the execution of a replevin-bond, but continues until the judgment is actually satisfied. — *Doe d. Sheets v. Roe*195
2. If a person have a lien on goods for the price of hauling them to a place of deposit, his subsequently claiming them as his own, and refusing, on that ground, to deliver them to the owner, is a waiver of the lien. — *Picquet v. M'Kay*.....465
3. If A. deposit with B. a quantity of grain for safe keeping, and, at the time of making the deposit, borrow money and buy goods on credit of B., the law creates no lien for the debt on the grain, in the absence of any agreement to that effect.

Ibid.

LIMITATIONS, STATUTE OF.

See BASTARDY, 5; PARTNERSHIP, 8.

1. At the foot of an account containing several items, charged in 1817, there was the following acknowledgment: "I acknowledge the above account to be just—*Thos. Neighbors*." *Held*, that this acknowledgment was a written contract which, under the act of assembly, was not barred by the statute of limitations. — *Neighbors v. Simmons*75
2. In 1804, the father of B. and C. delivered to B., in England, 75*l.*, with directions to pay the same to C. on the latter's arrival in America. In 1818, C. came to America where B. was then resident, and accounts on both sides immediately commenced between them, and continued running until 1826. The 75*l.* was charged in the account of C. against B. *Held*, that these mutual accounts, including the 75*l.*, were not within the statute of limitations; some of the items having been furnished within five years before the commencement of the suit. — *Knipe v. Knipe*340

LIS PENDENS.

See FRAUDULENT CONVEYANCE, 3;
VENDOR AND PURCHASER, 24.

1. The pendency of an action of slander does not, of itself, render the

defendant's sale and conveyance of real estate void as to the plaintiff; though a judgment be afterwards recovered against the defendant, and he have no other property to satisfy the debt. — *Ray et al. v. Roe d. Brown*258

2. The pendency of an action is constructive notice of the matter involved in that suit; and a purchaser of the property which is the immediate object of the pending action will be affected by it, as a purchaser with notice..... *Ibid.*

LOST BOND.

See EVIDENCE, 5.

Debt on a bond. Plea, a failure of consideration, in consequence of the non-performance, by the obligee, of the condition of a certain bond which was lost. *Held*, that the loss of the bond did not preclude the defence. — *Pence et al. v. Smock* ...315

LOST RECORD.

See EVIDENCE, 5.

M.

MALICIOUS PROSECUTION.

1. A made an affidavit before a justice of the peace, stating that he had lost certain goods, which he believed were concealed in the possession of B. The justice thereupon issued a warrant against B. for larceny. B. was arrested on the warrant and afterwards acquitted. *Held*, that A.'s affidavit contained no criminal charge, and that he was not therefore liable to B. in an action for a malicious prosecution. — *M'Neely v. Driskill*259
2. Case by A. against B. Counts in malicious prosecution for perjury, and in slander for words charging the same crime. Plea, that A. had committed the perjury alleged. *Held*, that B. might prove, on the trial, that A. had given advice as to the best mode of commencing the suit against B., in support of which A. was said to have afterwards committed perjury; and might also prove that A. had received information, before he gave his evidence, tending to show the want of any foundation for the suit against B. — *Scott v. Mortsinger*....454
3. *Held*, also, that the defendant, un-

- der the plea in this case, might show that there was a probable cause for his prosecution against the plaintiff.....*Ibid.*
4. The plaintiff, in the above-mentioned cause, in order to show malice in the defendant, had a right to prove that the slanderous words charged in the declaration had been spoken after, as well as before, the commencement of the suit.

*Ibid.***MALICIOUS TRESPASS.**

An indictment charged the defendant with having, by shooting, maliciously wounded and injured a young mare, the property of A., of the value of 80 dollars. *Held*, that the indictment was bad, under the statute, for not stating the amount of damages occasioned by the injury complained of.—*The State v. Peden.*

371

MARRIAGE.

See ABATEMENT, 3.

In an action for a breach of promise of marriage the plaintiff may introduce evidence of seduction.—*Whalen v. Layman*194

MEASURE OF DAMAGES.

See DAMAGES, 2, 3, 5; SEAT OF JUSTICE, 3; VENDOR AND PURCHASER, 29.

MERCHANTS' ACCOUNTS.

See INTEREST, 3-5.

MILITIA FINES.

See PLEADING, 12.

1. An alias or pluries list of militia fines may be issued by the judge advocate against the delinquents, whether they be persons conscientiously scrupulous of bearing arms or not; and it is not necessary for such list to be, like an execution, in the name of the state.—*Levelling v. Leuell*.....163
2. An action on a sheriff's bond, for not collecting militia fines due to the county seminaries, lies in the name of the state on the relation of the treasurer, who is the trustee of the fund.—*The State v. McClane et al*192

MISTAKE.

1. A., being the agent of a county,

sold certain town lots belonging to the county to B., and gave him a title-bond for the same. The bond was, by mistake and contrary to the intention of both parties, so drawn and executed as to appear obligatory on A. personally. *Held*, that the mistake could not be pleaded in bar to an action at law against A. on this bond.—*Lindley v. Cravens*426

2. *Held*, also, that after a judgment obtained against A. on the bond, he might, by a bill in chancery, have the judgment enjoined, and the mistake in the bond corrected; but that the county as well as B. must be made a party to the suit...*Ibid.*

MORTGAGE.

See VENDOR AND PURCHASER, 9.

1. If a person, holding a bond for the payment of money secured by a mortgage on real estate, proceed first upon the mortgage, he is precluded by the statute of 1824 from any other remedy. But he may proceed first upon the bond to judgment, sell the mortgaged property on execution, and hold the obligor liable for any balance that may remain due; in case the obligee waives his claim under the mortgage, and the purchaser at sheriff's sale holds the land freed from the mortgage.—*Youse v. M'Creary*..243
4. A person, holding a bond and mortgage for a debt, may proceed first by an action on the bond, and subject all the debtor's property both real and personal to his judgment, without abandoning his lien on the mortgaged premises, unless he have taken them in execution. But if the creditor elect to proceed first on his mortgage, he is obliged by the statute of 1824 to rely alone on the mortgaged premises for a satisfaction of his demand.—*Maikle et al. v. Rapp et al*.....465

N**NEW TRIAL.**

See ERROR, 2, 3, 5, 9, 10; JURY, 4-6. A new trial should not be granted in an action on tort, on the ground that the damages are excessive, unless they appear at first blush to be outrageous and excessive.—*Piquet v. M'Kay*... ..435

NOLLE PROSEQUI.

A *nolle prosequi* to the whole declaration has the effect, not of a *retraxit*, but of a discontinuance; and is no bar to a subsequent suit for the same cause.—*Lambert v. Sanford*.

137

NONSUIT.

See REPLEVIN, 8.

NOTICE.

See LIS PENDENS, 2; VENDOR AND PURCHASER, 2, 30.

NOTICE AND MOTION.

See JURISDICTION, 6; JURY, 8; RECORDS; BURNED.

NUL TIEL RECORD.

See ISSUE, 1.

O.

OATH.

See PERJURY.

OYER.

1. Oyer of a record is never granted.
Capp v. Gilman45
2. Although oyer of a record is not demandable, yet if profert of the record of a judgment on which the suit is brought be made and oyer granted, the defendant may demur if the judgment be of no validity. So, if the judgment be of a justice's Court in another state, which is not a Court of record.—*Cone v. Cotton et al*82
3. To deny oyer where it ought to be granted is error, but not *e converso*.—*The State v. Hicks et al*336

P.

PARENT AND CHILD.

1. A father may claim the services of his children, whilst they are under lawful age and are supported by him. But should he, at any time, relinquish that claim, the profits of his children's labor then belong to themselves, and can not be seized by the creditors of the father.—*Jenison et al. v. Graves et al*.
440
2. If a son of full age purchase land to be paid for in labor, and his father being employed for the purpose by the son, perform a part of the work; or if the payment is to be

in money, and the father lend his son a part of the money with which the payment is made—a trust *pro tanto*, will not, in either of those cases, result to the father.....*Ibid*.

PAROL AGREEMENT.

See CONTRACT.

PAROL EVIDENCE.

See EVIDENCE, 5, 6, 11; TRUST AND TRUSTEE, 2, 7, 11; VENDOR AND PURCHASER, 9, 28.

PARTIES.

See ABATEMENT; CHANCERY, 22, 23, 29; JOINDER; MILITIA FINES, 2; MISTAKE, 2; PLEADING, 7; REPLEVIN, 1, 2, 3; TRUST AND TRUSTEE, 4; VENDOR AND PURCHASER, 9.

1. The defendant had signed a subscription paper promising to pay a certain sum of money towards defraying the expenses of erecting the public buildings at Connersville, provided a new county should be established, and Connersville be made the seat of justice, the money to be paid into the hands of any person whom the board of commissioners of the new county should authorize to receive it. *Held*, that the county agent, having no legal or beneficial interest in the contract, could not sue upon it in his own name.—*Harper v. Ragan*.....39
2. If the agent had been specially appointed by the commissioners to receive the money, which was to be paid to any person thus appointed, that circumstance would not have authorized a suit in his own name.

Ibid.

3. *Semble*, that if one person promise another for the benefit of a third, the third person may sue*Ibid*.

PARTNERSHIP.

SEE EVIDENCE, 2, 3, 6.

1. The doctrine that the separate debt of one partner should not be paid out of the partnership estate, until all the debts of the firm are discharged, is correct; but it does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when the principles of equity are brought to interfere in the distribution of the

- partnership property among the creditors.—*M' Donald et al. v. Beach et al.*.....55
2. Those equitable principles operate on the property remaining in the possession of the partners, and embrace all that has been fraudulently disposed of; but they do not extend to such as has been previously transferred by the firm in good faith.....*Ibid.*
3. Although one partner can not bind his co-partner by deed, yet a deed executed by one for himself and partner, in the other's presence and by his authority, is the deed of both.—*Modisett v. Lindley et al.* 119
4. Assumpsit by partners for work and labor. *Held*, that evidence of the statements of one of the partners, made after the dissolution of the partnership, so far as they tended to show a new contract destroying the partnership claim, and giving to each partner a separate demand for his part of the debt, was not admissible; but that the statements of such partner, so far as they showed a payment made to himself, might be proved.—*Lefavour et al. v. Yandes et al.*240
5. Payment of a debt to one partner of a firm is good against the other partners; and a release by one partner to a debtor of the firm is obligatory on the others.—*Yandes et al. v. Lefavour et al.*.....371
6. Assumpsit in the name of A. and B. against C. for work and labor performed by the plaintiffs as partners. The defendant offered to prove admissions, made by one of the plaintiffs after the partnership was dissolved, tending to show that, after the dissolution, the parties had made a different contract respecting the payment for the work than that under which the work had been done. *Held*, that the evidence was inadmissible.....*Ibid.*
7. The admission of one partner as to the existence of a debt against the firm, made subsequently to the dissolution of the partnership, is not binding on the other partners. *Ibid.*
8. An acknowledgment of a debt, made by one partner after a dissolution of the partnership, is not sufficient to take a case out of the

statute of limitations as to the other partners*Ibid.*

PAWN.

See PLEDGE.

PAYMENT.

See BOND, 12; JUDGMENT, 6, 7; PARTNERSHIP, 4-6.

PERJURY.

1. In an indictment for perjury, the oath said to be false was charged to have been administered in the Circuit Court by S. C. as deputy clerk. *Held*, that no proof of the appointment of the deputy clerk was necessary; that in administering the oath, S. C. acted under the superintendence of the Court; and that the oath was as obligatory as if it had been administered by one of the judges.—*Server v. The State.* 35
2. An indictment for perjury must show conclusively that the testimony given by the defendant, and charged to be false, was material to the issue on the trial of which he was sworn.—*Weathers v. The State*278
3. If a witness, with an intention to deceive the jury, swear so as to make an impression on their minds that a fact material in the cause is different from what it really is, and from what he knows it to be, he is guilty of perjury.—*Scott v. Mortimer.*.....454

PLEADING

See ABATEMENT, 1, 2; ATTACHMENT, 1; BASTARDY, 2; BOND, 2, 7, 10, 11; CONDITION PRECEDENT, 1; CONSTABLE, 2; CORPORATION, 1; DEMURRER; EXECUTORS AND ADMINISTRATORS, 2, 3, 5, 9, 11, 12, 14, 16, 17; FORCIBLE ENTRY AND DETAINER, 1; FORMER RECOVERY; INSOLVENT LAWS, EFFECT OF DISCHARGES UNDER, 1, 2, 6; JUDGMENT, 1, 4, 5; JURISDICTION, 5; JUSTICE OF THE PEACE, 1, 5-7; LOST BOND; OYER; PROFERT; PROMISSORY NOTES, 4; RECOGNIZANCE, 3; SEAT OF JUSTICE, 2; SLANDER, 3, 5; STATUTE, 2; TENDER, 2; TRESPASS, 1, 3-5; VARIANCE; VENDOR AND PURCHASER, 3, 10, 17, 18, 21; WAIVER.

1. A special plea of non est factum, alleging a material alteration of the bond without the obligor's consent, may, if not sworn to, be rejected on motion; but it can not be treated as a nullity.—*Riley et al. v. Harkness*.....34
2. The plaintiff can not demur and reply to the same plea.....*Ibid.*
3. A. assigned to B. a note against C. in payment of a judgment which B. had obtained against A.; and it was agreed that if the money could not be obtained by due course of law from C., A. would pay to B. the amount due on the judgment. *Held*, that, in a suit by B. against A., after a failure to recover the money from C., an averment in the declaration that the plaintiff had, without delay, prosecuted C. to insolvency without obtaining the money, is insufficient; that due diligence, in the prosecution of a suit, is a matter of law arising out of the facts of the case, which facts must be set out that the Court may determine whether they show due diligence or not; that the time when and the place where suit was instituted, the time judgment was obtained, the nature of the execution, the time it issued, and the sheriff's return, should be set forth.—*Harrington v. Wetherow*37
4. Covenant on an obligation for the payment of money. Plea of payment and a release, which release the plaintiff had since destroyed. Replication, that the plaintiff had not destroyed the release. *Held*, that the plaintiff, not having specially demurred to the plea for duplicity, as he might have done, was bound to answer all its parts; and that the replication, therefore, not denying the payment, was insufficient.—*Reno et al. v. Hollowell*...38
5. If the county and circuit, in which an action on the judgment of a Court in another state is brought, be named in the margin of the declaration, no objection can be made for want of a venue.—*Capp v. Gilman*45
6. The act authorizing a defendant, in actions of assumpsit, to plead a warrant or failure of consideration specially, is cumulative, and does not take away the party's right, existing before the act, to avail himself of such a defence under the general issue.—*Jamison v. Buckner*.....47
7. A declaration stated that A., B. and C., county commissioners of the county of Scott, complained of the administrator of D. for money had and received by the intestate to the use of the plaintiffs, and which he had not paid to the plaintiffs. *Held*, that the words "county commissioners of the county of Scott," were only a *descriptio personarum*.—*White v. Rankin et al.*.....78
8. If two replications be filed to one plea, the defendant may demur specially for the duplicity; but a rejoinder to the replications cures the objection.—*King v. Anthony*.....131
9. Whatever comes under a *vide licet*, if inconsistent with the precedent matter, may be rejected as surplusage.—*Blackwell v. The Board of Justices of Lawrence County*...143
10. It is sufficient for a plea of justification in trespass, to justify that which is the gist of the action, matters merely in aggravation need not be answered.—*Levelling v. Leavelle et al*163
11. A plea of justification in trespass, can not be objected to for the want of a venue; the place being laid in the declaration, and the trespass justified being alleged to be the same with that complained of.—*Ibid.*
12. If A. and B. justify in trespass, as sheriff and deputy sheriff, under an alias list of militia fines issued by a judge advocate, the plea must show which of the defendants is the sheriff, and which the deputy. *Ibid*
13. If there be two pleas, each to the whole cause of action, and one on demurrer be adjudged good, the plaintiff can proceed no further.—*Cutler v. Cox*.....173
14. If, to assumpsit on a promissory note, the defendant plead a failure of consideration on account of the non-delivery of goods, the plaintiff may reply generally that the consideration has not failed. The note is *prima facie* evidence of a consideration; and the want or failure of consideration, in such case, must be pleaded and proved.—*Mitchell v. Sheldon et al*185

15. It is unnecessary, in the declaration on a sheriff's bond, to aver a non-payment of the penalty. *Aliter*, in the case of penal bonds payable by one private person to another.—*The State v. M'Clane et al.*.....192
16. If a plea, in bar of a writ of error, answer only a part of the errors assigned, it is bad on demurrer.—*Millar v. Farrar*.....219
17. A release of errors executed for the purpose of procuring an injunction, may be pleaded in bar of a writ of error, although the injunction had been refused and the bill dismissed*Ibid.*
18. If a plea of accord and satisfaction by the delivery to the plaintiff of certain property, does not state a time when the delivery was made, it is bad on special demurrer.—*Pence et al. v. Smock*.....315
19. A general plea to an action on a bond, that the bond had been obtained by fraud and covin, without setting out the particulars of the fraud, is good*Ibid.*
20. Debt against the administrator of A. on a joint and several bond executed by A. and B. to the plaintiff, conditioned for the performance of covenants. Plea, that the intestate was only a surety; that the plaintiff had agreed with B., without the defendant's knowledge, to take a judgment by confession against B. for 275 dollars, in a suit on the bond then pending against him, it being a less sum than the plaintiff pretended he could recover: and to take a judgment against the present defendant for the costs of an action then pending against him on the bond; that judgments had been rendered conformably to this agreement. *Held*, that this plea was not double; and that it was a good bar to the action.—*Porter v. Brackenridge*.....385
21. A plea, to be objectionable for duplicity, must contain more than one valid defence to the suit ...*Ibid.*
22. Debt against A. on a penal bond payable to the state. The condition of the bond was, that A. should well and truly discharge the duties of collector of the state and county revenue of Owen county for the year 1829, and pay over the same as by law required. The declaration, after setting out the bond and condition, averred that A. had not paid over the taxes assessed on the county of Owen to the county treasurer, nor accounted for the same to the said treasurer, in the manner prescribed by law. *Held*, on special demurrer, that the declaration was insufficient.—*Evans et al. v. The State*.....387
23. A declaration in debt on an attachment-bond, after setting out the bond and condition, averred that the attachment had been sued out, brought to issue, tried, and adjudged to be void, without cause, tortious, and oppressive; and that the plaintiff had been much oppressed, and put to great trouble and expense, in defending himself against said false, feigned, and vexatious proceedings of the defendant. *Held*, on special demurrer, that the determination of the attachment-suit, the damages sustained, and the want of cause for the attachment, were set out with sufficient certainty.—*Morris et al. v. Price*457

PLEDGE.

The absolute right of property and the right of possession in a note, which had been pledged for the payment of a debt, become, on payment of the debt, vested in the pledgor; and if the note be afterwards converted by the pledgee to his own use, he is liable to the pledgor in an action of trover.—*Elliott v. Armstrong*198

PLENE ADMINISTRAVIT.

See EXECUTORS AND ADMINISTRATORS, 11, 12, 16, 17, 28.

PRACTICE.

See CHANCERY, 8, 9, 24, 27, 29; DEMURRER TO EVIDENCE; EVIDENCE, 12, 13; ISSUE; JOINDER; JURY, 12; PLEADING, 1, 2, 13; SHERIFF, 1; WAIVER.

1. If a defence be filed, which is not relevant to the cause, it may be rejected on motion.—*Evans et al. v. Shoemaker*237
2. The issues must be made up before the jury are sworn, excepting only that a *Similiter* may be dispensed with.—*Swan v. Rary*291

3. An affidavit by the plaintiff's attorney, that he had left the replication on the clerk's table with the papers in the cause, and that it had afterwards come into the deponent's possession by mistake, does not show, with sufficient certainty, that the replication had been properly filed.....*Ibid.*
4. The party on whom the affirmative of the issue lies has a right to open and conclude the cause.—*Kimble v. Adair*.....320
5. If, after the examination of a witness is closed, his re-examination be asked for and refused, this Court will presume such refusal to be correct, unless the record show that there was a good cause for the re-examination.—*Scott v. Mortsinger*.....454

PRESUMPTION.

See BOND, 12; ERROR, 6-8; PRACTICE, 5; VENDOR AND PURCHASER, 23.

PRINCIPAL AND AGENT.

See MISTAKE; PARTIES, 1, 2; SHERIFF, 2, 7.

1. If an agent execute an obligation for his principal, not warranted by the power, the principal being unapprised of the nature of the obligation, will not be bound by it, though he was in the room when the obligation was executed, and though his subsequent agent conceived himself authorized to comply with similar obligations so executed by the first agent.—*Modisett v. Lindley et al.*.....119
- 2 S., resident in another state, forwarded to M., in Indiana, who was not an attorney at law, a note against H. for 200 dollars, to be collected. M. placed the note in the hands of an attorney at law for collection. The attorney collected the money, and left the country without paying it over to M. *Held*, that S. could not, under these circumstances, sustain an action for money had and received against M. *Held*, also, that if M. could be made liable for the money in any form of action, it must be on one founded on his having acted fraudulently or imprudently in entrusting the note to the attorney; or on his having failed to use proper means to obtain the money from

the attorney after its collection.—*Markle v. Steele*344

3. A. deposited with B. a note for the payment of money against C., to be accounted for by B. to A. when collected. B. afterwards gave up this note to the sheriff to be sold on a fee-bill against A., B. and D., in a case in which A. was the principal and B. and D. were his sureties. The sheriff, accordingly, levied upon and sold the note to satisfy the fee-bill. *Held*, that B., for this breach of duty, was liable to A. in an action on the case.—*M'Clelland v. Hubbard*361
4. A. agreed in writing to sell to B. a tract of land for a certain sum. Payment to be made by B.'s delivering to A., or to his agent, C., a boat and cargo of produce by the first rise of the Ohio river, sufficient to take boats over certain rapids in the river. If the boat, &c., could not be prepared by the time specified, the payment was to be subsequently made in a different manner. The conveyance to be made when the land should be paid for. B. took possession of the land; and delivered the boat and cargo to C., as A.'s agent, but not till several weeks after the first rise of the river, sufficient for the purpose above-mentioned. C. took the property to N. Orleans; but what became of the proceeds did not appear. *Held*, that C., as the special agent of A. to receive the property, had no authority to receive it after the first rise of the river. &c., and that the subsequent delivery of the same to him did not entitle B. to a conveyance of the land from A.—*Longworth v. Conwell*469
5. *Held*, also, that supposing C. to have been the general agent of A., still the delivery, under the circumstances of the case, of the boat and cargo to C., after the time specified in the contract, was not binding on A.*Ibid.*
6. It is a general rule that the principal is bound by the acts of his general agent, though the agent exceed his private instructions. But the rule does not apply to cases where the person dealing with the agent is apprised of the existence of the private instructions*Ibid.*

PRINCIPAL AND SURETY.

See SURETY.

PROBATE COURT.

See EXECUTORS AND ADMINISTRATORS, 15, 18.

PRO CONFESSO.

See CHANCERY, 10 15, 16.

PROFERT.

See EXECUTORS AND ADMINISTRATORS, 2; OYER, 2.

In an action on a judgment, profert of record is unnecessary; the *prout patet per recordum* is sufficient even on special demurrer.—*Capp v. Gilman*45

PROMISSORY NOTES.

See BOND, 1, 4, 5, 12; CORPORATION, 2; EXECUTION, 4; PLEADING, 3, 14, 19.

1. A., having a promissory note against B. which was due, promised him by parol and without consideration, that he would not urge the payment until a certain future time. Held, that the promise was not obligatory.—*Berry v. Bates*..118
2. In the sale of personal property, not in market overt, the general rule is, that, though the purchase be *bona fide* and for value, the purchaser receives no better title than that of which the seller was possessed. But bills of exchange and promissory notes are exceptions to this rule; when they are originally payable to bearer, or when, in the first instance, they are payable to order and afterwards by a blank indorsement become payable to bearer, they pass by delivery; and the purchaser who uses due caution, pays a valuable consideration, and takes them in the common course of business, has a good title against all the world, whether the seller had any title or not. A note payable to order, however, can not pass without an indorsement either by the payee, or by some person in the payee's name and by his authority.—*Elliott v. Armstrong*. 198
3. The assignee of a promissory note, assigned before it was due, delayed thirty days after it became due be-

fore he sued the maker. Held, that the indorser was not liable, in such a case, for the maker's default, unless the indorsee could show that an earlier proceeding was impracticable, or would have been unavailing.—*Merriman v. Maple* ..350

4. Assumpsit by the assignee of a promissory note, payable on the 30th of October, 1829, against the maker. Plea, that the payee and another, on the day the note was given, executed to the maker their obligation for the delivery of a certain quantity of bricks on the 1st of May, 1829; that the note was given in consideration of the delivery of the bricks; that the bricks had not been delivered, and the consideration of the note had therefore failed. Held, on demurrer, that the plea was a good bar to the action.—*Bowles v. Newby* 364
5. The indorser of a note, under our statute, warrants two things: 1st, that the note is valid and the maker liable to pay it; 2d, that the maker of the note is solvent and able to pay it.—*Howell v. Wilson*.....418
6. If the indorsee sue the maker, and fail on the ground that the note had been obtained without consideration, the indorser is not bound by this judgment against the validity of the note, if notice was not given him of the pendency of the suit. But the indorser may show, in bar of an action against him by the indorsee under those circumstances, that the consideration of the note was a good one.....*Ibid*.
7. The indorsee of a note, obtained from the maker without consideration, has no right, as soon as he discovers the imposition, to sue the indorser for having assigned him a note which the maker is not liable to pay.....*Ibid*.

PURCHASER.

See VENDOR AND PURCHASER.

Q.

QUIATIMET.

See CHANCERY 3.

R.

RECEIPT.

See EVIDENCE, 7.

RECEIVING STOLEN GOODS.

Indictment for receiving stolen goods knowing them to be stolen. *Held*, that the time and place, when and where the goods were stolen, need not be stated in the indictment, nor proved at the trial.—*Holford v. The State*.....103

RECOGNIZANCE.

1. The surety in a recognizance before a justice of the peace, for the principal's appearance at the Circuit Court to answer a criminal charge, can not discharge himself by a surrender of his principal to the justice.—*Stegars v. The State*.
104
2. The surrender in such cases, accompanied by a certified copy of the recognizance, may be made to the sheriff*Ibid*.
3. A., B. and C. entered into a recognizance for A.'s appearance on the first day of the term of the next Circuit Court to answer a charge of larceny. On the first day of the term A. failed to appear. He also made default on the second day, when the recognizance was declared forfeited, and a scire facias issued thereon returnable to the next term. Plea to the scire facias, that no presentment or indictment had been found against A., though, since the date of the recognizance, two grand juries had been impaneled. *Held*, on demurrer, that the plea was insufficient.—*The State v. Cooper et al*226
4. In all cases in which the state takes an obligation from an individual for the performance of any duty, it should be by recognizance, unless the law otherwise direct.—*Dickerson v. Gray*230

RECORD.

See JURY, 3, 13; OYER, 1, 2; PROPERT; VENDOR AND PURCHASER, 30.

1. Neither the capias ad respondendum, nor the sheriff's return on it, can be noticed by this Court, unless it be made a part of the record in some way known to the law.—*Hays v. M'Kee*11
2. Neither an affidavit for a continuance, nor any objection of a party to the ordering on a cause for trial,

is any part of the record unless made so by a bill of exceptions.—*Wilson v. Coles*402

RECORDS, BURNED.

In order to have a judgment re-entered, under the statute of 1827 relative to the burned records of Dearborn county, the notice to the defendant, which answers the purposes both of a writ and declaration, must state the term at which the judgment was originally rendered.—*Weaver v. Bryan*.....172

RELATION.

See VENDOR AND PURCHASER, 16.

RELATOR.

See EXECUTORS AND ADMINISTRATORS, 9.

RELEASE.

See PARTNERSHIP, 5; PLEADING, 4, 17; VENDOR AND PURCHASER, 14.
An agreement under seal not to sue for a limited time can not be pleaded in bar as a release: the defendant must resort to his action on the agreement.—*Berry v. Bates*.....118

RENT.

See DISTRESS; EXECUTION, 2; REPLEVIN, 4, 5, 7, 9.

REPLEVIN.

See COSTS, 1; DISTRESS; JUDGMENT, 6; RIGHT OF PROPERTY, TRIAL OF.

1. Replevin lies by a person not having the actual possession of the goods when taken, provided he have at the time the general property and the right of immediate possession.—*Chinn v. Russell*.....172
2. Any person, except the execution-defendant, may have replevin, under our statute, for his goods taken in execution.....*Ibid*.
3. A joint execution may issue against a judgment-debtor and his replevin-surety.—*M' Coy et al. v. Elder*...183
4. If an action of replevin be brought for taking several articles, and, on an issue as to the plaintiff's property in them, he only prove himself entitled to a part, the defendant has a right to a return of the others and to damages for the taking of them. In such case each

- party succeeds, and each is entitled to his costs.—*Wright v. Mathews et al*187
5. An avowry for rent due need not show that a warrant, founded on oath, had been taken out before making the distress; nor that the goods distrained belonged to the tenant; nor need it set out the particulars of the landlord's title.—*Ibid.*
6. A. to whom B. was indebted, levied an attachment on certain goods as B.'s property. C., the owner of the goods, brought an action of replevin against A. and recovered.—*Louisville and Portland Canal Company v. Holborn*267
7. In an action of replevin by L. against W., the defendant avowed the taking of the goods as a distress for rent, due to him from the plaintiff. To this avowry, the plaintiff pleaded *non tenuit* and *riens in arrear*. Issues were joined upon these pleas. There was a verdict for the defendant on both the issues; the jury finding the amount of rent in arrear, but not the value of the goods distrained. The Court held, that the common-law judgment for a return of the goods to the defendant, and for his costs of suit, might be rendered on this verdict; but that there could be no judgment in his favor for the arrears of rent.—*Larkin v. Wilburn*.
343
8. If the plaintiff, in an action of replevin, be non-suited, he is not thereby barred from bringing another action of replevin; the merits of the cause not having been tried. This is the common law; and the statute in England of Ed. I., prohibiting a second replevin after a nonsuit, is local to that kingdom and not in force here.—*Daggett v. Robins*415
9. The action of replevin is not limited to cases of distress; but lies in all cases of a tortious and unlawful taking and detention of goods and chattels*Ibid.*
10. Writs of replevin, in this state, are issued out of the Circuit Court and returned thither as writs in other cases; and the action of replevin is proceeded in and tried as other actions are.....*Ibid.*
- REPLEVIN-BOND.
See LIEN, 1.
- RESULTING-TRUST.
See TRUST AND TRUSTEE, 1-3, 7, 8, 10, 11.
- RETRAXIT.
See NOLLE PROSEQUI.
An attorney at law has no authority to enter a *retraxit*; that being a perpetual bar.—*Lambert v. Sandford*137
- REVIVOR, BILL OF.
See CHANCERY, 25, 26.
- RIGHT OF PROPERTY, TRIAL OF.
Goods found in possession of A., an execution-defendant, were levied on by the sheriff. B. claimed the goods as his, and a jury, summoned to try the right of property, found that they belonged to A. Held, in replevin by B. against the sheriff, that the finding of the jury was not conclusive against B.—*Chinn v. Russell*172
- S
SALE.
See VENDOR AND PURCHASER.
- SALE FOR TAXES.
See VENDOR AND PURCHASER, 31, 32.
- SCIRE FACIAS.
See BASTARDY, 1, 2; JUDGMENT, 1;
- SCROLL.
See SEAL.
- SEAL.
An ink seal, commonly called a scroll, has the same effect, by statute, as if it were made with wafer or wax, —*Vanblaricum et al. v. Yeol*322
- SEAT OF JUSTICE.
1. A statute authorized the re-location of a seat of justice in a county, and gave to the owners of lots in the old town, after the re-location, on their complying with certain conditions, a right to a conveyance by the county agent of certain lots

- in the new town in exchange for theirs in the old one. The county accepted the statute, and the seat of justice was removed. *Held*, that the owner of a lot in the old town, having performed the precedent conditions prescribed by the statute, and demanded of the county agent a conveyance for the proper lot in the new town, might, if the title were refused, maintain an action of assumpsit against the Board of Justices for a breach of their contract, implied from the county's acceptance of the statute.—*Blackwell v. The Board of Justices of Lawrence County*.....143
2. *Held*, also, that if the important facts, showing the cause of action, were correctly set out, the declaration could not be objected to on general demurrer on account of its improper conclusion, that the plaintiff ought to recover the value of the lot in the new town.....*Ibid*.
3. *Held*, also, that the value of the lot in the old town, at a reasonable time before the passage of the statute for the re-location, was the real consideration that passed from the plaintiff for the lot in the new town; which consideration, with interest from the time the lot in the old town was relinquished to the county, was, in this case, the measure of damages*Ibid*.
4. A seat of justice may be removed by statute, on such terms as the legislature deems reasonable; and the county, having accepted and acted on the statute, is bound to comply with the terms imposed on it by the statute*Ibid*.

SECURITY FOR COSTS.

See BOND, 10, 11.

SEDUCTION.

See MARRIAGE.

SEISIN.

See DAMAGES, 2; VENDOR AND PURCHASER, 20.

SET-OFF.

1. A debt due by A. and B. to C. can not be set off, either at law or in equity, against a debt due by C. to A. alone.—*Elder v. Lasswell et al.*

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2. There is no difference, on the subject of set-off, between Courts of law and equity; the rule is the same in both Courts.....*Ibid*.

SHERIFF.

See BOND, 3, 6, 7; ESCAPE; EVIDENCE, 9; EXECUTION; PLEADING, 12, 15; RIGHT OF PROPERTY, TRIAL OF.

1. The process of the Supreme Court is, by statute, directed to the sheriff of that Court, who receives the same and forwards it, with his mandate, to the sheriff of the county in which it is to be executed. The sheriff of the proper county makes his return to the sheriff of the Supreme Court, and the latter returns it to that Court.—*M'Gruder v. Russell*18
2. The general doctrine is, that a sheriff is liable for the acts of his deputy. But as the authority of the sheriffs of the several counties to execute the process of the Supreme Court is neither conferred by the sheriff of that Court, nor subject to be revoked or abridged by him, he is not liable for their conduct.....*Ibid*.
3. In an action against a sheriff for a false return, the execution is admissible in evidence, though it do not specify the day on which it is returnable.—*Bosley v. Farquar et al.* 61
4. The sheriff's return to a fieri facias was, that he had not levied because the plaintiff would not give him an indemnity. *Held*, that this return was unknown to the law, and that the cause must stand as if no return were made*Ibid*.
5. Even if such an indemnity could be required in any case, it should be demanded as soon as the circumstances authorizing the demand were known to exist*Ibid*.
6. If the sheriff, in consequence of vague rumors as to whether certain goods are the debtor's or not, return nulla bona without having the right of property tried by a jury, he will be liable for a false return, on proof that the goods were subject to the execution*Ibid*.
7. If it appear that a person has acted generally as a deputy sheriff, with the sheriff's knowledge and consent, the sheriff is liable for the

- official acts of such person, though he may not have given him any express authority *Ibid.*
8. If a sheriff take and sell the property of A. on an execution against B. he is liable to the owner, in trespass or trover, without demand. — *Jamison v. Hendricks*.....94

SHERIFF'S SALE.

See EXECUTION; FRAUDULENT CONVEYANCE, 2, 4; FRAUDULENT JUDGMENT; VENDOR AND PURCHASER, 1, 2, 4-8, 15, 22, 23, 25, 28, 29, 33, 34.

SIMILITER.

See PRACTICE, 2.

The addition of the similiter is only a matter of form, and the want of it is aided by a verdict. — *Hays v. M'Kee*.....11

SLANDER.

See MALICIOUS PROSECUTION, 4.

1. In a prosecution before a justice of the peace for an assault and battery under the statute of 1818, the defendant was found guilty by the jury and fined three dollars. An action of slander was afterwards brought for words charging the plaintiff with having sworn false on that trial; and the words were objected to as not being actionable, on the ground that the justice had no jurisdiction. *Held*, that though the statute were deemed unconstitutional so far as it gave the justice authority to inflict a fine exceeding three dollars, yet when, as in this case, the fine inflicted did not exceed that sum, the objection was untenable. — *Clark v. Ellis*.....8
2. Slander for charging a man with illicit intercourse with his wife's sister. *Held*, that the words did not contain a charge of incest, but only of fornication or adultery. *Held*, also, that as, at the time of speaking the words, neither fornication nor adultery was an indictable offence, the words were not actionable. — *Dukes v. Clark*20
3. Case by A. against B. for slanderous words. Plea that the defendant had heard from C. the charges mentioned in the declaration, and that at the time the defendant spoke the words, he stated that C. had told him so. Replication, that

the defendant had spoken and published the words falsely and maliciously with a knowledge that they were false, and with the intent alleged in the declaration. *Held*, on special demurrer, that the replication was good. — *Crane et ux. v. Douglass*.....195

4. An action of slander was brought by B. against M., for words charging the plaintiff with stealing, and for words charging him and his family with murder. The defendant pleaded not guilty. *Held*, that words charging the "B. family" with stealing, or with murder, might be proved by the plaintiff to show malice; but that no slanderous words spoken of the plaintiff's wife alone were admissible as evidence in this action. — *M'Glimmery v. Brush*226
5. A declaration in slander charged the defendant with having said that the plaintiff had sworn false on a certain trial before a justice of the peace; but there was no averment that the testimony alleged to be false was material. *Held*, that the declaration could not be objected to, after verdict, for the want of that averment. — *Wilson v. Harding*. 241
6. A plaintiff in slander, having first proved that the defendant had spoken to third persons the words laid in the declaration, may prove, in support of the declaration, that the defendant had spoken the same words in answer to the plaintiff's interrogatories. — *Gordon v. Spencer*. 286

SPECIFIC PERFORMANCE.

1. A bill for a specific performance of a contract is addressed to the discretion of the Court; and it should always show that the complainant had done all which could be equitably required of him. — *Dougherty v. Humpston*273
2. When a conveyance is decreed to be executed in such a case, the usual form is, to require the person who has the legal title to execute the conveyance, if he is of legal discretion and within the jurisdiction of the Court..... *Ibid.*
3. A. having obtained a judgment against a county, purchased under an execution on the judgment, a number of town lots belonging to

the county. Afterwards, at a public sale of these lots by the county, B. bought one of them for a small sum with notice of the previous sale, paid the purchase-money, took a receipt for the same, and entered into possession. A. died, and the county made a compromise with his heirs, who released their interest in the said lots to the county, on receiving back the purchase-money paid by A.; the purchasers at the said public sale, B. among the rest, agreeing by parol to release their interest in the lots to the county on being re-paid their purchase-money. The county tendered to B. his purchase-money for the lot he had bought, which he refused to accept; and he refused also to execute the release. C., afterwards, with B.'s knowledge, and without any objection by B., purchased the last-named lot of the county, and received a deed from the county for the same. A bill in chancery, filed by B. against the county to obtain a title for the lot thus bought by C. was dismissed for want of equity.—*Jacques v. The Board of Commissioners of Vigo County*..403

4. Upon an application to a Court of equity, for a specific execution of a contract for the sale of land, the Court must be satisfied that the claim is reasonable and just, and the contract equal in all its parts, and founded on an adequate consideration. If any of these points be not established by the complaint, he will be left to his remedy at law.—*Modisett et al. v. Johnson et al*431

SPIRITUOUS LIQUORS, RETAILING OF.

See INDICTMENT, 3.

1. The fine, on a conviction of retailing spirituous liquors without a license, belongs to the county for the purpose of education; but this circumstance need not be stated in the judgment.—*Townsend v. The State*..151
2. A license, to retail spirituous liquors for three months was granted by the board of county justices. The license, as appeared on its face, had been granted on the payment of fifty cents. *Held*, that, under the statute, no license to keep a tav-

ern or to retail spirituous liquors, could be granted on the payment of a less sum than five dollars; and that, therefore, the license in this case was, *prima facie*, absolutely void*Ibid*.

STATE.

See BASTARDY, 1, 3; COSTS, 3

STATUTE.

See DECREE, 2, 3; FRAUDS, STATUTE OF; JUDGMENT, 1; LIMITATIONS, STATUTE OF; SEAT OF JUSTICE.

1. A statute may be unconstitutional as to one part of it, and valid as to the residue.—*Clark v. Ellis*.....8
2. The statutes of other states are not noticed by our Courts, unless they be pleaded and proved.—*Elliott et al. v. Ray*31
3. If a statute be repealed, and the repealing act itself be afterwards repealed, the original act is revived.—*Doe d. Wayman v. Naylor*...32
4. The act of 1827, giving the Supreme Court jurisdiction in certain cases decided by the Circuit Court on appeal from the judgment of a justice of the peace, is prospective only, and does not apply to cases determined by a justice before the taking effect of the act.—*Maguire v. Nowland*76
5. Statutes enacted at the same session of the legislature are to be taken in *pari materai*, and should receive a construction which will give effect to each if possible. But if each of them can not have the same entire effect when taken in connection with the others that it would have if taken singly, they must be so construed as to give effect to what appears to have been the main intention of the legislature.—*The State v. Rackley*249

SUBSCRIBING WITNESS.

See WITNESS, 1, 2, 4;

SUGGESTION OF BREACHES.

See DAMAGES, 4, 7; JUSTICE OF THE PEACE.

SUPREME COURT.

See ERROR; ESCAPE, 1, 2; SHERIFF, 1, 2.

SURETY.

See BOND, 7, 8, 10, 11; EVIDENCE, 3, 9; EXECUTORS AND ADMINISTRATORS, 1, 6-9; JUSTICE OF THE PEACE, 3; RECOGNIZANCE, 1-3; REPLEVIN, 3.

1. The single fact that the creditor has taken a judgment by confession from the principal debtor, with a stay of execution for six months, can not be pleaded by the surety in bar of an action against him by the creditor. The plea in such case, to be valid, must also show that the creditor could, by the ordinary proceedings at law, have collected the money sooner from the principal debtor than by the course which he had pursued; and that the time was given to the principal without the surety's consent.—*Barker v. M'Clure*14
2. In a suit against the administratrix of A. on a bond in which he was surety for B. as sheriff, a judgment previously obtained against B. on the same bond is inadmissible as evidence for the plaintiff.—*The Governor v. Shelby*26
3. If the administratrix, being sued on the bond, had given notice of the pendency of the suit to B. and there had been judgment against her, that judgment would have been conclusive against B. in a suit against him by the administratrix. *Ibid.*

SURRENDER.

See RECOGNIZANCE, 1, 2.

SWINDLING.

See TRESPASS, 5.

T

TAXES.

See VENDOR AND PURCHASER, 31, 32.

TENANT.

See LANDLORD AND TENANT.

TENDER.

1. A tender and refusal of the property (or that which is equivalent) at the time and place fixed by the contract for its delivery, vests the property in the creditor; and puts an end to his right to sue upon the contract.—*Mitchell et al v. Merrill*.

87

2. The plea of tender, in such a case, need not state that the defendant was afterwards ready, or that he brings the property into Court.

Ibid.

TITLE-BOND.

See CHANCERY, 3, 12; COMPANY, UNINCORPORATED; COVENANT, 7; DAMAGES, 2; DISSEISIN, 1, 4; DOWER, 2; EJECTMENT, 4; MISTAKE; VENDOR AND PURCHASER, 3, 17-20, 33, 34.

TRESPASS.

See MALICIOUS TRESPASS; PLEADING, 10-12; SHERIFF, 8.

1. To an action for false imprisonment against a justice of the peace and a constable, the defendants pleaded in justification that an affidavit had been made before the justice, charging the plaintiff with having violently assaulted, beaten and wounded the deponent, wherefore the justice had issued his warrant, &c. *Held*, that the plea was not objectionable, after a verdict in favor of the defendants, for not showing that the assault and battery were charged to have been unlawfully made.—*Cooper v. Adams et al*294
2. A person arrested on a justice's warrant for a breach of the peace, can not maintain an action of false imprisonment against the justice or constable, in consequence of a mere informality in the warrant; provided the justice have jurisdiction *Ibid.*
3. If a judicial officer, whether possessed of a general or a special jurisdiction, act erroneously or even oppressively in the exercise of his authority, an individual at whose suit he acts is not answerable, as a trespasser, for the error or misconduct of the officer. But if a judicial officer whose jurisdiction is special and limited, transcend his authority and act in a case of which he has no cognizance, his proceedings are *coram non judice*, and no person can justify under them.—*Taylor v. Moffatt*305
4. The defendant, in an action of false imprisonment, justified under a writ of attachment ordered, at his instance, by a Circuit judge. The writ was issued against the

plaintiff, for a contempt in disobeying a writ of injunction granted by the judge. The injunction was granted, and the writ of attachment was ordered and issued, in vacation. *Held*, that the defence was insufficient; the judge having no authority, in vacation, to order the writ of attachment.....*Ibid*.

5. Trespass and false imprisonment. Plea, that the plaintiff, by his false representations respecting the circumstances of a third person, had induced the defendant, then in Louisiana, to sell there on a credit to such third person a boat laden with corn; that the plaintiff and the purchaser absconded without paying for the corn, and were fugitives from justice; that the defendant, for these reasons, made oath before a justice in this state, that the plaintiff and the purchaser had swindled him out of the price of his corn; that a warrant for swindling was accordingly issued by the justice against the parties complained of, upon which the plaintiff was arrested, taken before the justice, and by him committed to gaol, which is the same trespass, &c. *Held*, on demurrer, that the plea was insufficient.—*Hall v. Rogers*429

TRESPASS ON THE CASE.

See VENDOR AND PURCHASER, 12.

1. A declaration contained two counts. The 1st stated that the defendant, on his unenclosed land in the county, cut a tree so that it was nearly ready to fall, and set it on fire; and that the tree afterwards fell upon and killed the plaintiff's horse. The 2d count stated, that the defendant, knowing the plaintiff's horse to be running at large in the unenclosed lands of the county, and maliciously contriving to injure the plaintiff, unlawfully and negligently cut a tree in the county and set it on fire; and that the tree afterwards, in consequence of the cutting and burning, fell upon and killed the plaintiff's horse. *Held*, that the declaration contained no cause of action.—*Durham v. Musselman*96
2. When an action on the case is brought for fraud in the breach of a contract, the gist of the action is

the fraud committed at the time of the breach; and if the plaintiff can not maintain an action for the fraud committed at that time, no subsequent damages will enable him to maintain it.—*Cutler v. Cox*. 178

TROVER.

See PLEDGE; SHERIFF, 8; VENDOR AND PURCHASER, 8.

1. The plaintiff may recover, in trover, for the injury done to his goods, as well as for their value.—*Jamison v. Hendricks*94
2. To support the action of trover, the plaintiff must prove property and the right of possession in himself, and a conversion by the defendant.—*Picquet v. M'Kay*465
3. If the defendant has a lien on the goods for which trover is brought against him, the action can not be sustained, unless a tender have been made to the defendant of the amount of the claim*Ibid*.

TRUST AND TRUSTEE.

See PARENT AND CHILD, 2.

1. A trust estate in real property, as separate from the legal ownership, may either be credited by an express declaration of the trust; or it may be raised upon certain facts by implication of law.—*Elliott v. Armstrong*198
2. The statute of frauds requires all declarations of trust in land to be proved by written testimony; but those trusts which arise by the mere operation of law, are excepted out of the statute and may be proved by parol evidence.....*Ibid*.
3. If A. purchase land with his own money, and the deed be made to B., a trust results in favor of A., provided there be no circumstances in the case to rebut this presumption of the law.....*Ibid*.
4. To a bill in chancery by the grantee of a *cestui que trust* against the trustee to obtain the legal title, the grantor need not be a party either as complainant or defendant..*Ibid*
5. The estate of a *cestui que trust* may be sold and conveyed by him, as well as any other estate*Ibid*.
6. The estate of a bare trustee is not subject to be sold on an execution against him*Ibid*.
7. A complainant in chancery may

prove, by parol evidence, in order to show a resulting trust, that the purchase-money for real estate conveyed to another was paid by himself, though the deed state that the money was paid by the grantee, and the answer contain a denial of the trust.....*Ibid.*

8. The trust, in real estate conveyed to A., results in favor of B., in consequence of his payment of the purchase-money, is a kind of arbitrary implication raised, to stand until some reasonable proof be brought to the contrary; and if the money was paid for the express purpose of vesting in A. both the beneficial and legal interest, no trust can result in favor of B..*Ibid.*
9. A trustee, no matter how or from whom he derives his authority, can not purchase the trust-estate so as to make a profit to himself. He is not prohibited from purchasing; but his purchase, when made, is for the benefit of the *cestui que trust*, who may, if he apply within a reasonable time, have a re-sale. If the property be offered for sale a second time, and there be no advance, the trustee is held to his purchase.—*Brackenridge v. Holland et al*377
10. If one man buy land with his own money, and take the deed in the name of another, a trust results by implication in favor of him who paid the money.—*Jenison et al. v. Graves et al.*.....440
11. The existence of a resulting trust may be proved by parol evidence, in opposition to the face of the deed and the answer of the trustee, but to establish the trust, under those circumstances, the clearest and the strongest testimony must be produced..... *Ibid.*

U

USURY.

See CHANCERY, 1, 2.

V

VARIANCE.

Debt on a writing obligatory for the payment of *one hundred and twenty dollars*. The declaration set forth the sum in words as above. The note, when produced on oyer, showed a promise to pay \$120; the

sum being expressed in figures. *Held*, that the variance was immaterial.—*Long v. Long*293

VENDOR AND PURCHASER.

See EXECUTORS AND ADMINISTRATORS, 19, 20; FRAUDULENT CONVEYANCE; FRAUDULENT JUDGMENT; LIS PENDENS; PROMISSORY NOTES, 2; SPECIFIC PERFORMANCE; TRUST AND TRUSTEE.

1. The real estate of B. was, in 1823, sold on execution under a judgment recovered against him by A. in 1822, which judgment had not been replevied. A., the execution-plaintiff, was the purchaser for 565 dollars. The property sold had been appraised, under the statute of 1820, at 4,640 dollars. In ejectment by A. for the premises, it was held that no bid for the land could be made under the statute of 1820, for less than 2,320 dollars, the one-half of the appraised value; and that the sheriff's sale therefore for 565 dollars was void, and his deed conveyed no title to the purchaser.—*Harrison et al. v. Doe d. Rapp*...1
2. If the purchaser of real estate at sheriff's sale be the execution-plaintiff, he is considered a purchaser with full notice, and accountable for all irregularities.....*Ibid.*
3. Debt by the assignee of a sealed note for the payment of money against the maker. The note was dated on the 10th of June, 1817, and payable on or before the 1st of December, 1818. Plea, that the note was given to the payee for the purchase-money of a certain tract of land which he represented to be his, and for which he was to make a title to the defendant when the note should be paid; that the payee never had a title to any part of the land; and that, at the time of the plea, he was insolvent and had absconded from the state. *Held*, that the plea was, under the statute, a good bar to the action.—*Davis v. Clements*.....3
4. By the statute of 1817, real estate might be sold on an execution of fieri facias, without an inquiry as to the value of the rents and profits, or a venditioni exponas; unless the execution-defendant required an inquest.—*Doe d. Wayman v. Naylor*.

5. The statute of 1821 supplied an omission in that of 1817, by authorizing a venditioni exponas and sale of land, where the rents and profits had been offered for sale, but would not bring a sufficient sum to pay the debt.....*Ibid.*
6. A venditioni exponas was not necessary, under the statute of 1817, except in cases where there had been an inquest.....*Ibid.*
7. By the statute of 1810, an inquest and venditioni exponas were necessary without request*Ibid.*
8. A horse which was the property of A. was purchased by B. at a sheriff's sale on an execution against C. After B. had sufficient reason for believing the horse to be A.'s property, he exercised acts of ownership over him, and made use of evasive measures to prevent A. from obtaining him. *Held*, that A. might recover in trover for the horse against B., without proving a demand and refusal.—*Jamison v. Hendricks*94
9. A. filed a bill in chancery against B., the heir, and C., the administrator of D., stating that the complainant had sold and conveyed a lot of ground to D. without receiving the purchase-money, and that D. had died insolvent. Prayer that the lot might be sold to pay the purchase-money. An order of publication was made as to the heir, who was a non-resident. The administrator filed an answer and cross-bill, stating that the conveyance, though absolute on its face, was intended as a mortgage to secure the payment of a debt due from A. to D., and praying a sale of the lot to pay the debt.
Held, 1st, that there could be no decree for the complainant without proof that the order of publication, as to the heir, had been made. 2d, that parol evidence of the complainant's admissions as to the deed's being intended to be a mortgage, should be received with great caution; and ought not, where there are circumstances raising a contrary presumption, to be permitted to control the deed.—*Abern v. Burnett et al.*..... 101
- 10. To a debt on a writing obligatory for the payment of money, the defendant pleaded that the obligation had been given for a pair of mill stones, fraudulently represented to be good, but which were of no value.
Held, that in this case, and in that of a breach of warranty, if, in addition to the fraudulent representations, or to the breach of warranty, the defendant prove that the article is of no value, or that it has been returned or tendered within a reasonable time, he defeats the action but if it appear that the article is of some value and has not been returned or tendered, the plaintiff recovers the value.—*Wynn et al. v. Hiday*123
11. *Quere*, whether A.'s unconditional possession of goods which had been sold by him to B., renders the sale *per se* fraudulent and void, or is only evidence of fraud, as to A.'s creditors.—*Chinn v. Russell*172
12. In the sale of goods with an express warranty as to their quality, assumpsit lies for the breach of contract not under seal, or case lies for the commission of the tort. So, if an injury be occasioned by the negligence of an attorney, or of a stage proprietor, assumpsit lies on the undertaking or case upon the duty.—*Cutler v. Cox*178
13. A. contracted to sell to B. certain real estate, in consideration that B. should give up a note held by him against A., and pay to A. a small sum of money. The giving up of the note to A. was the principal part of the consideration. B. subsequently pledged the note to a third person, and absented himself from the country for seven years, without paying any part of the purchase-money. *Held*, that A. was discharged from the contract.—*Elliott v. Armstrong*..... 198
14. A release, by the grantee, of the covenant of warranty contained in a conveyance of real estate, does not affect the validity of the conveyance.....*Ibid.*
15. The sale of real estate on a void execution is a nullity, and vests no title in the purchaser.....*Ibid.*
16. A. made a verbal contract for the purchase of a town lot, and, during A.'s absence from the country, B., partly with his own money, but principally with A.'s property, completed the contract for A., and took

- the deed in the name and for the benefit of A. *Held*, that A.'s subsequent ratification of B.'s acts, made him liable to B. for the amount paid for him by B.; and also rendered the lot as A.'s property liable, from the date of the deed, to a judgment against him in favor of B. *Ibid.*
17. In an action on a title-bond conditioned to make a deed for real estate on payment of the purchase-money, the declaration averred a payment of the money and a failure to make the deed. Plea, that, before the commencement of the suit, the defendant had tendered the deed, which was refused; that he had always been ready, and was still ready, &c. *Held*, on demurrer, that the plea was good; it not appearing but that the payment was made on the day the deed was tendered.—*Galletly v. The Board of Justices of Owen County*221
18. If the owner of real estate covenant to make a title to it on payment of the purchase-money, and the same be afterwards paid, the obligor is not liable to an action for not conveying, unless the deed have been previously demanded.—*Sheets v. Andrews*274
19. *Quære*, whether the purchaser, in such case, should tender the deed to the vendor for execution.... *Ibid.*
20. In the case of a breach of the covenant of seisin, or of warranty, contained in a conveyance of real estate, or of a breach of a covenant to convey, the measure of damages, if there be no fraud, is the purchase-money with interest *Ibid.*
21. Debt on bond for the payment of money. Plea, that the obligation had been given to the plaintiff in part payment of a tract of land purchased of him by the defendant, which land had been previously devised to the plaintiff; that the plaintiff knew of the will, and had had it under his control, for three years next ensuing the testator's death, but had not, within that time, caused the same to be proved and recorded. *Held*, on demurrer, that the plea was insufficient.—*Long v. Long*.....293
22. The reversal of a judgment on error, after a sale of land under it on execution, does not affect the purchaser's title.—*Frakes v. Brown*. 295
23. A purchaser of land at sheriff's sale is not obliged to show that the debtor had not personal property to satisfy the judgment. It is only necessary for him to show the judgment of a competent Court, and the kind of execution which authorizes the sheriff to sell. He has a right to presume that all the intermediate proceedings are correct.... *Ibid.*
24. During the pendency of a petition for a divorce and alimony, the Court may make an order on the defendant requiring him not to dispose of any of his real or personal property; but the purchaser of real estate from the defendant will not be affected by the order, unless he have actual notice of its existence; the pendency of the suit and entry of the order not being sufficient of themselves to avoid the conveyance *Ibid.*
25. The purchaser of real estate at sheriff's sale may obtain a decree setting aside a deed which had been made to defraud the judgment-creditor, and securing the purchaser's title against any claims under the fraudulent deed; but the decree can not vest the absolute fee in the complainant *Ibid.*
26. The right of the owner of real estate to carry on trade there to the exclusion of all others, can not be made the subject of a separate conveyance, so as to prevent a subsequent holder of the property, without his own agreement, from pursuing his lawful business there.—*Taylor v. Owen et al.*.....301
27. Same point decided.—*Taylor v. Moffatt et al.*.....304
28. If a purchaser of real estate at sheriff's sale refuse to pay the purchase money, and the property be sold for a less sum at a second sale, the liability of the first purchaser for the difference, under the statute of 1825, may be established by parol evidence.—*Cowgill v. Wooden*. 332
29. The sheriff is not obliged to take the mere word of any person, who may bid at a sheriff's sale, that he is the agent of the execution-creditor *Ibid.*
30. A subsequent conveyance of real estate, although first recorded, will

not prevail against a prior one which is not recorded until after the expiration of the time prescribed by law, if the subsequent purchaser had actual notice of the prior conveyance.—*Ricks v. Doe d. Wright*346

31. If the sale of town lots for taxes was authorized by the revenue act of 1818 (which is doubtful), the validity of a sale under the act can only be established by legal proof that the law had been strictly complied with.—*O'Brien et al. v. Coulter et al*421

32. Two town lots, one with a house on it, the other unimproved, worth 400 or 500 dollars, were sold together for a tax of 4 dollars. *Held*, that the sale under those circumstances was illegal *Ibid.*

33. A judgment is no lien on land, which the debtor holds by a bond conditioned for the execution of a title on payment of the purchase-money, though he had taken possession and paid the money before the rendition of the judgment; and a sheriff's sale, on execution against the obligee, of land so held, conveys no estate to the purchaser.—*Modisett et al v. Johnson et al* ..431

34. The statute of frauds, authorizing the sale of lands on execution against a *cestui que trust*, does not extend to the equitable interest possessed by the obligee of a title-bond*Ibid.*

VENUE.

See ERROR, 1; PLEADING, 5, 11.

VERDICT.

See EXECUTORS AND ADMINISTRATORS, 12, 22; FORCIBLE ENTRY AND DETAINER, 2; JURY, 3-7, 13; REPLEVIN, 7; SIMILITER.

VIDELICET.

See PLEADING, 9.

VOIRE DIRE.

See WITNESS, 3.

W.

WAIVER.

See LIEN, 2.

The defendant, by pleading to the action, waives all objection on ac-

count of the want of process.—*Hays v. M'Kee*.....11

WARD.

See GUARDIAN AND WARD.

WARRANT.

See CONSTABLE.

The warrant of a justice of the peace, on a charge of an assault and battery, commenced as follows: "The state of Indiana, Allen county, ss: To William Brown, constable of Adams township, greeting." *Held*, that no objection could be made to the warrant, on account of its not repeating, in the mandatory part of it, the name of the state.—*Cooper v. Adams et al*.....294

WARRANTY.

See DAMAGES, 3; VENDOR AND PURCHASER, 10, 12, 14, 20.

WILL.

1. A testator, commencing his will by expressing an intention to dispose of all his worldly estate, devised to his wife all his lands and tenements for life, together with all his household goods and chattels. If his wife married again, she was still to enjoy the real estate, but without power to dispose thereof except by leasing it for a term not exceeding one year at a time. If she married and died without issue, the real estate was to descend to a nephew of the testator; but if she had issue, the estate was to descend to such issue. The testator died, having made no further disposition of his property, and leaving no children. On a claim by the testator's brothers, his heirs at law, *held*, that all the personal estate, including moneys and obligations, passed, by the will, to the widow of the deceased.—*Lutz et al. v. Lutz*.....72

2. The construction of a will depends, not so much upon any rigid principle of law, as upon what appears by the will to have been the testator's intention *Ibid.*

3. A will, after directing the personal estate to be sold, and that the real estate leased until the rents, with the proceeds of the sale of the personal property, should be sufficient

to pay the after named legacies, contained the following provision : "I will and bequeath to my sister Isabel the sum of 50 dollars annually, to be paid out of the rents of the place and the proceeds of the sale of my personal property, and continued until the following sums are paid." The will then gave several legacies, and directed that, after their payment, the real estate should be sold and a distribution made.

Held, that in each year the 50 dollars were to be paid to Isabel, before any payment to the other legatees.—*Parks v. Perry*74

4. *Held*, that, by the statute law of this state, a will, devising real estate, must be in writing, signed by the testator, and attested by two credible witnesses in presence of the testator; and that it may, in the same manner, be revoked. *Held*, also, that a will in such a case as well as a revocation, is valid without being sealed.—*Doe d. Knapp et ux. v. Pattison et al.*...355

5. If land devised be afterwards sold by the devisor to a stranger, the devisee takes nothing by the devise.—*Raburn v. Shortridge*480

WITNESS.

See BOND, 6; CHANCERY, 17; EVIDENCE, 10, 13; PRACTICE, 5.

1. One of two subscribing witnesses to a bond being called to prove its execution, denied his signature.

Held, that the other, if he could be procured, should be examined; but if he could not be found, secondary evidence might be resorted to.—*Booker v. Bowles*90

2. If a subscribing witness deny his signature, the case stands in the same situation as if his name were not on the instrument*Ibid.*

3. If a witness be objected to as interested, and his interest be proved by other witnesses, the party calling the witness has no right to examine him on his *voire dire*; that right belonging alone to the party who makes the objection.—*Wright v. Mathews et al*187

4. The subscribing witness to a deed resided in Ohio, and the acknowledgment had been taken there before the mayor of Cincinnati. *Held*, that the deed—on proof that the grantor had executed it, and that the witnesses had subscribed it, in the presence of the witness—was admissible in evidence.—*Ungles v. Graves*191

5. No confession of interest made by a witness, after a party is entitled to his testimony, can render him incompetent.—*Sims et al. v. Givan*. 461

6. To exclude a witness on the ground of interest, he must appear to be interested in favor of the party who calls him*Ibid.*

WRIT OF INQUIRY.

See INQUIRY, WRIT OF.

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